Erik Oddvar Eriksen/John Erik Fossum/
Agustín José Menéndez (eds.)

The Chartering of Europe

The European Charter of Fundamental Rights and
its Constitutional Implications

◆ Nomos Verlagsgesellschaft
Baden-Baden

Bibliografische Information Der Deutschen Bibliothek

Die Deutsche Bibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie ; detaillierte bibliografische Daten sind im Internet über http://dnb.ddn.de abrufbar

Bibliographic information published by Die Deutsche Bibliothek

Die Deutsche Bibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at http://dnb.ddb.de

ISBN 3-8329-0162-0

1. Auflage 2003-12-08

Contents

Contributors

Alan C. Cairns is Professor Emeritus at the University of British Columbia. He is the author and editor of numerous books and articles on federalism, the constitution, and the charter: *Constitutionalism, Citizenship, and Society in Canada* (1985), *Charter versus Federalism: The Dilemmas of Constitutional Reform* (1992), *Citizenship, Diversity, and Pluralism: Canadian and Comparative Perspectives* (1999), and *Citizens Plus: Aboriginal Peoples and the Canadian State* (2001).

Erik Oddvar Eriksen is Professor of Political Science at ARENA at the University of Oslo. Recent publications include *The Rationality of the Welfare State* (co-edited with Jørn Loftager) (1996), *Jürgen Habermas. Diskurs, rätt och demokrati* (co-edited with Anders Molander) (1997), *Kommunikativ ledelse* (1999), *Democracy in the European Union* (co-edited with John Erik Fossum) (2000), *Demokratiets sorte hull* (2001), and *Understanding Habermas* (co-authored with Jarle Weigård) (2003).

John Erik Fossum is Senior Researcher at ARENA, University of Oslo, and Associate Professor at the University of Bergen. Recent publications include *Oil, the State, and Federalism* (1997), *Democracy in the European Union* (co-edited with Erik Oddvar Eriksen) (2000), and "The European Union In Search of an Identity" (2003).

Jürgen Habermas is Professor Emeritus of Philosophy and Sociology at the University of Frankfurt. A brief selection of some of his recent books includes *The Theory of Communicative Action* (1981), *Moral Consciousness and Communicative Action* (1983), *The Philosophical Discourse of Modernity* (1985), *Postmetaphysical Thinking* (1988), *Justification and Application* (1991), *Between Facts and Norms* (1996), *The Inclusion of the Other* (1998) and *Die postnationale Konstellation* (1998).

Neil MacCormick is Regius Professor of Public Law and the Law of Nature and Nations at the University of Edinburgh. He is a Fellow of the British Academy and of the Royal Society of Edinburgh. He is the author of many books and articles on legal and political theory, among others *Constructing Legal Systems: The European Union* (ed.) (1997), *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999), and *Stands Scotland where She Did? New Unions for Old in these Islands* (2000).

Miguel Poiares Maduro is Professor of Community Law and Public International Law at the University Nova of Lisbon and co-director of the Academy of International Trade Law. Recent publications cover *We the Court – The European Court of Justice and the European Economic*

Constitution (1998), and "Europe and the Constitution: What if this is as Good as it Gets?" (2000).

Agustín José Menéndez is Senior Researcher at ARENA, University of Oslo. He has recently published a book on the democratic theory of taxation, *Justifying Taxes. Some Elements of a General Theory of Democratic Tax Law* (2001).

Olivier De Schutter is Professor at the Faculty of Law at the University of Louvain. He is also a Visiting Professor at the University of Limoges and Secretary General of the Human Rights League. He has published many books and articles, among others *Le droit international des droits de l'homme devant le juge national* (in collaboration with S. van Drooghenbroeck) (1999), and *Les droits fondamentaux dans le Traité d'Amsterdam* (in *Le Traité d'Amsterdam. Espoirs et deceptions*) (1998).

Justus Schönlau holds a Ph.D. from the Department of Politics of the University of Reading. The title of his dissertation was *The EU Charter of Fundamental Rights: Legitimation through Deliberation*. During a prolonged stay in Brussels and from within the European Parliament, he followed the process of drafting the Charter very closely.

Daniel Tarschys, formerly Secretary General of the Council of Europe, is Professor at the Department of Political Sciences at the University of Stockholm. A brief selection of his publications includes *Beyond the State: the Future Policy in Classical Marxism* (1972), *Europe as Invention and Necessity* (1999), *Bra träffbild, fast utanför tavlan – en ESO-rapport om EU:s strukturpolitik* (2000).

Massimo La Torre is currently Professor at the Università di Catanzaro and at the Law School at the University of Hull. He has published several books and articles, among which *European Citizenship: An Institutional Challenge* (editor) (1998) and *Norme, Instituzioni, Valori: Per une Teoria Instituzionalistica del Diritto (*1999*)*.

Foreword

Neil MacCormick

> The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.
>
> Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.[1]

It is surely true that any effective and enduring European Union will have to be based not merely on a shared body of common laws, but also on common values expressed in these laws. The shared resolve that is stated in the opening paragraphs of the Preamble to the Charter of Fundamental Rights of the European Union expresses an essential precondition for a peacefully achieved and constitutionally sustained union. The present work, ably edited by Professors Eriksen, Fossum and Menéndez, explores some of the presuppositions and implications, as well as the politics, of adopting such a Charter.

The creation of the Charter, as this book explains in some detail, was achieved by a new and radically innovative method. Instead of referring the task of drafting a document to a Committee of Civil Servants, following this up with a meeting of the European Council or even an intergovernmental conference, preparation of the Charter was entrusted to a body of an essentially parliamentary, perhaps one should say, 'parliamentarian' character. The task was carried out by a 'Convention' of representatives from the European Parliament and from the parliaments of the Member States, together with representatives of each of their governments and of the Commission, chaired by Roman Herzog, former President of Germany. The finished document was handed over to the European Council and the Parliament, and came under consideration at the Intergovernmental Conference ('IGC') held in Nice in December 2000.

As adopted by the Nice IGC, the Charter had only an equivocal status. It was embraced as a 'political declaration', not a legally binding instrument incorporated in or co-ordinate with the Treaty of European Union

[1] Preamble to the Charter, opening two paragraphs.

or the European Community Treaty. As such a declaration, it was a set of reminders or reassurances to citizens. It reminded them what rights they already enjoyed under the two Treaties, under the common traditions of their various constitutional laws, and under the European Convention on Human Rights, and various other Conventions and Charters, respect for human rights being a basic obligation of Member States in the Union.

The European Parliament, the Commission and the Council, however, declared that they would treat it as politically binding in all their activities. The Court of Justice and Court of First Instance thus might accept the Charter as a guide to interpretation of acts done under its guidance, but could not use it as a binding source of law. It was not, or not yet, built into the fundamental rule of recognition of European community law.

I. The Constitutional Convention

After the Declaration by the European Council at Laken in December 2001, a new Convention similar to that which drafted the Charter was set up. Its task was to propose a way of simplifying the Treaties and to consider the possibility of constitutionalising them. By an innovation, it was to involve representatives of parliaments and governments of the thirteen states seeking accession to the Union as well as its fifteen existing members; but the proportion of members of the European Parliament declined as against the earlier convention.

Under the presidency of Mr Giscard D'Estaing and with Messrs Amato and Dehaene as Vice Presidents, the Convention on the Future of Europe got itself under way on 28 February 2002. From the outset its ambition was unequivocal: to reform the Treaties into one 'Constitution-Treaty' for the Union, and to abandon the 'pillar' structure of the Maastricht Treaty that juxtaposed to the Community the other 'pillars' of Justice and Home Affairs, and Foreign and Security policy. The latter pillars were organised through the Council using an intergovernmental method in contrast to the 'community method' with its institutional balance among Commission, Council, and Parliament.

If there were to be, in effect, a new Constitution of the Union, albeit one whose adoption would depend on a new treaty agreed at an Intergovernmental Conference, what would be the place of a Charter of Rights? From the outset, the great majority of participants in the new Constitutional Convention (so to call it) argued that the Charter must be a keystone of the Constitution. Many argued that all contemporary state constitutions are anchored in an acknowledgment of certain rights as fundamentals, to be protected by the judiciary against encroachment by executive or legislative action. How could a European Constitution do less?

What could be more appropriate than to adopt the Charter, either as the first chapter of a new constitution or as an extended preamble thereto.

II. Rights Collisions?

This view was not unanimous, however. Two lines of argument coincided in opposing it. First was an argument about the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, 'ECHR'). The ECHR and the Human Rights Court at Strasbourg have served Europe well over fifty years. Their service has been to the whole of Europe, as the Council of Europe has steadily extended its membership eastwards. Would it not undermine the Human Rights Court and the ECHR, vitally important as these are in providing a common umbrella for Europe outside the Union as well as for the fifteen member states, soon to be twenty-five? Does it not in itself trivialise the concept of fundamental rights if there are different but similar sets of rights differently interpreted by different courts but all claiming to be fundamental in the same sense, with binding effect on similar sets of agencies and persons?

The second argument, not unrelated, doubted the practical consequences of adopting the Charter in the context of the balance of competences between the Union Institutions and the Member States. A decidedly attractive feature of the Charter is the plain, unadorned language in which it is written, and the categorical simplicity of its statements of rights, whether to Integrity, to Liberty, to Equality, to Solidarity, to civil and political rights or to judicial protection. A further feature is the recognition of new or emerging rights, such as those involving bodily integrity, or data protection, or the like. The problem, however, is that a Charter written in attractively simple language may give rise to many interpretational difficulties. The upshot could easily be that it comes to be construed very broadly, without regard to the limits implicit in rights grounded in more technically-drafted instruments like the ECHR. Where might such a Charter end up? Might it effectively be read as conferring powers on the Union institutions across the whole range of human life touched by any of its articles?

The governments of the United Kingdom and of Ireland openly, and certain other governments more quietly, expressed concern on both grounds. They considered that the Strasbourg Court and the ECHR gave a satisfactory guarantee of rights within the Union as well as outside it, avoiding ambiguity or conflict between different instruments and different instrumentalities. They were concerned that, by an interaction between Single Market rules and rights-provisions, the Union would be interpreted as exercising competences that reached into domains they considered exclusive to the states both under the principle of attribution of competences and under that of subsidiarity.

They were concerned that the Charter implicitly invited judges in the Union's tribunals to indulge in extensively creative jurisprudence.

The Constitutional Convention established several Working Groups during the middle phase of its deliberations. One was on the Legal Personality of the Union, another on the Charter of Rights. The former made the recommendation that the Union and the Community should come together and that the states should explicitly confer on the Union legal personality in international law. That rather technical recommendation cleared the way for another, from the Vitorino Working Group on Rights. This was the recommendation that the Union should accede in its own right to the ECHR, acknowledging the jurisdiction of the Human Rights Court in respect of the Union and its institutions, a jurisdiction already valid in respect of every member state and every accession state.

III. Constitutionalising the Charter

What then of the Charter? Most of Vitorino's Working Group, like the majority on the floor of the Convention, already favoured incorporation of the Charter with binding legal effect. The concerns of the United Kingdom and Ireland, and shadowy others in the background, in the end crystallised on Articles 51 and 52, the so-called 'horizontal articles'. These set limits on the scope of the Charter, declaring it to be operative only in respect of the institutions of the Union and the member states when engaged in implementing Union law. They declare its ineffectiveness to grant new competences to the union institutions, and confine those that re-state rights guaranteed by the ECHR within the same qualifications and limitations as in the ECHR and the jurisprudence of the Human Rights Court. A similar clause limits the rights (such as to freedom of movement) based on other provisions in the Treaties to the terms in which they are there stated.

The Working Group adjusted the terms of these to take account of the Charter's becoming part of the constitution-treaty. It then added a new clause limiting rights based on common constitutional traditions to make clear that they operate under whatever qualifications and limitations are also found in those traditions. A further additional clause differentiated the rights explicitly conferred in the Charter from those that merely stated principles. The latter were to be considered only as interpretive guides to relevant legislation, not as being directly justiciable in themselves.

The Charter rights were thus very explicitly confined to being read as a reconfirmation of essentially the same rights as in the ECHR or in existing constitutional traditions, or in other sections of the constitution treaty itself. Under these restrictions, concerns about incoherence between Charter and ECHR, or about rights-inflation or rights-creep, could be assuaged, and a basis for agreement on legal recognition and justiciability of the Charter

established. So it was done, and the governments that had expressed hostility to a binding and justiciable Charter indicated willingness to accept it in its new form. The Working Group's report was well received by the Convention on 28–29 October 2002, though not without complaint by members who considered the proposed new horizontal articles to have effectively emasculated the Charter.

Thus as of December 2002, it is possible to say with good confidence that the Convention will propose a constitution that incorporates the Charter of Rights, albeit in somewhat restrictive terms. The outlines of the eventual constitution are becoming clear. It will considerably simplify the jumbled body of treaty law, dealing at its outset with the name, composition and citizenship of the Union, and the rights guaranteed to human beings within its jurisdictional space, including those civil and political rights that are restricted to citizens only. The objectives of the Union and its competences will be declared, its institutions named, their composition regulated, and their specific share of Union competences allocated. The principle of attribution of powers will be stated and matched by principles of subsidiarity and of proportionality.

One way or another, a balance will be struck between intergovernmental elements that look primarily to empowerment of the European Council and the Council of Ministers, and communitarian elements, focused more on the Commission and the Parliament. Thus will be struck the balance between confederal and federal in the framing of this *sui generis* supranational union. The great debate between a council-based Presidency and a Commission Presidency given democratic legitimacy by Parliament's choice following a European Parliament election will have been concluded one way or the other. New states will be on the brink of assuming full membership in the Union. All this will have been achieved by an open and parliamentarian process in a Convention conducted in full public view, not by the somewhat discredited methods of the old-style Intergovernmental Conference after the manner of Nice.

One should not, however, overstate the changes. What is happening belongs to evolution more than to revolution. The process will have been an exercise of critical rather than constructivist rationality[2], adjusting and improving pre-existing institutions and structures in accordance with principles already immanent in them. It will not be a construction to a grand design newly invented from the ground up. And that is just as well.

[2] See Friedrich A. von Hayek: *Law, Legislation, and Liberty*, vol. 1, *Rules and Order* (London: Routledge & Kegan Paul 1976), pp. 5–9, 14–17, 29–34.

IV. A Polity in the Making

Only in one sense can it be said that this new constitution treaty gives the union a constitution where none existed before. There certainly was never before a document expressly calling itself a constitution. But it does not follow that there was not a lawfully constituted European Community and European Union. Of course there was. In a functional sense, the Union has had a constitution since the Maastricht Treaty, and the Community had one long before that, effectively ever since the Rome Treaty came fully into force and grew to acquire an aura of constitutional jurisprudence through the Court's interpretation and implementation of its fundamental elements.[3]

In that context, it is of significance that the Charter does have a markedly declaratory character. It really does state in plain and clear terms the rights that citizens of the Union already in principle enjoy, through various provisions of the Treaties, especially that in Article 6 of the Community Treaty whereby the ECHR rights together with those to be found in the constitutional traditions of the member states are recognised as fundamentals for the Union. There is already a community of values at the heart of the European Union, and these values are pursued under the rule of law in a constituted political order whose norms both confer and restricts powers, and impose binding obligations together with their counterparts, enforceable rights. Without this, the 'Union citizenship' devised at Maastricht would have been symbol without substance.

If we Europeans-within-the-Union are now genuinely able to endow ourselves with a Charter of Rights as the cornerstone of a new formal and explicit constitution of the Union, it is because we already have a functional or material constitution in which more or less the same rights are implicit. It may seem a paradox that only those who already have a constitution can give themselves a new one. But the point is that some kind of a constitutional framework is a necessary prerequisite for the existence of a people, a demos, capable of democratic decision making in which majority votes can legitimately bind minorities. The European Union shows how, from something that was initially an international treaty but which came to be recognised as the framework for a *sui generis* legal order, there can evolve such a civic entity can evolve. From this has grown a commonwealth or polity of its own kind, poised between confederation and fully federal union, exercising public powers among an association of post-sovereign states engaged together in a not-yet-self-sufficiently sovereign union.

To borrow an idea from Jürgen Habermas, if not in quite the way he would put it, supranational citizenship depends on constitutional patriotism

[3] See Neil MacCormick: "On the Very Idea of a European Constitution", (2001-2)*Juridisk Tidskrift*, pp. 529-41 and compare Neil MacCormick: *Questioning Sovereignty* (Oxford: Clarendon Press 1999), pp. 137–143.

oriented toward a supranational constitution, such an attitude being also motivated by the desire for peace and solidarity as conditions of decent prosperity. Constitutional patriotism presupposes a constitution. So peoplehood must first evolve through an implicit or functional constitution. Only after that can a formal constitution be articulated in a clearer and purer form, explicitly founding itself on a Charter of Rights as the guarantor of an equal citizenship.

Habermas' own views on this feature prominently in the present fascinating collection of essays, each of which is the fruit of deep reflection and highly original scholarship and research. The whole work constitutes a remarkable and timely record of a significant moment in the development of the new legal and political order, that is the European Union. Very probably, our descendants will look back at the work of the two Conventions, the Charter Convention and the Constitutional Convention, and find in them a decisive moment in the construction of a profoundly important experiment in supranational self-government. Perhaps they will be seen as foundational for a novel form of democracy operating at many levels in accordance with the principle of subsidiarity, with traditional full sovereignty attributed to no single level. I hope so. However that may be, our descendants will certainly rejoice to have available the kind of reflective contemporary debate on the Chartering of Europe that is found in this volume.

Chapter 1

The Charter of Fundamental Rights in Context

Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez

A Constitutional Moment?

Europe's political order is undergoing a profound transformation. Since the 1600s, Europe has experienced the rise of relatively homogeneous and powerful nation-states. The Westphalian treaty of 1648 founded the international order on the principles of co-existence and non-interference among sovereign states. At present this system is facing change, partly spurred on by internal dynamics and partly driven by exogenous forces, such as globalisation. The same processes of institution building at the European level that helped *rescue* the nation-state after the Second World War now seem to be challenging the fundamental building blocs of democratic governance in Europe. These processes have helped create a set of institutions at the European level that have proven successful in replacing or supplementing policy making at the state level, in an ever widening range of policy fields. Member States variously adapt to, resist and encourage these developments.[1] The result is a complex pattern of co-evolution of the two levels. These developments have profound political implications. As European states have become increasingly interdependent and intertwined the parameters of power politics within Europe have changed – with potentially global implications.

In such a context, the emerging entity labelled the European Union has developed legal-institutional traits that in significant ways deviate from the standard template of the nation state. Neither does it comply with the core characteristics of international regime or international organisation. This has prompted many analysts to insist that it is an entity *sui generis*. In polity terms, the EU is still in a major sense a meeting place of ideas and templates rather than a chiselled out and finished product. However, this does not imply that the process is open-ended. The EU, whilst equipped with significantly weaker sanctioning means than those of the state, is still contributing to a major reorganisation of political power in Europe, and simultaneously, to the transformation of its own political structures. For the Member States, the European level has become increasingly important as an integrated part of the political regulation of society. EU policies now cover virtually all areas of

[1] This also applies to affiliated states, such as Norway, Iceland and Liechtenstein and affected states, such as the Mediterranean African countries.

public policy, to the extent that truly exclusive competences of the Member States are nominal only. Most of the rules governing the exchange of goods, services and capital in the Member States are established, fully or partially, at the European level. The Union thus has a powerful impact on the distribution of power and resources. The net upshot is that the EU has emerged into a political community in its own right, however incomplete it may be in important senses. It is no longer a mere derivative of the Member States. The principles, organisational and institutional structures, and action programmes, associated with present-day EU, an entity that established the Economic and Monetary Union and is currently involved in preparing for a major enlargement of its membership, require direct legitimation.

One of the main challenges to this new political community is then *normative*. The EU suffers from a well-documented democratic deficit but it has been involved in a very lengthy and protracted process of 'constitutionalisation'. This has two main sources. On the one hand, is the almost constant process of Treaty change and amending, with the Member States at the helm in the European Council, and aimed at enhancing the efficiency of Community action, as well as increasingly also improving its democratic legitimacy. On the other hand, is the process of Court-made legal integration, forged by courts at several levels. One important trait here is that the EU has become increasingly imbued with a European system of rights, of multiple sources, such as the common constitutional tradition of the Member States, the European Convention of Human Rights (ECHR) and the European Court of Justice's own embrace of constitutional principles and practices. These developments have accumulated over time. They might lead Europe to a genuine *constitutional moment*.[2] Such a moment is one in which the people gives itself a constitution. This presupposes a persistent public mobilisation, expressed not only in unusual turnout in elections, but also in active public discussion.

One marker of this is the solemn proclamation of *the Charter of Fundamental Rights of the European Union* in December 2000.[3] This book stems from a concern with the role of the Charter in fostering a constitutional moment in Europe. It addresses the question of the nature and character of the Charter, why it is needed, and what is its contribution to the constitution making process in the EU.

The book is divided in three sections. The first section deals with *why* a charter of fundamental rights is needed. The section includes a chapter comparing the European and the Canadian Charters. In the second section, we address the processes and deliberations leading to the formation of the

[2] On this, we take sides with Bruce Ackerman: *We the People* (Cambridge: Harvard University Press 1991).

[3] OJ C 364, of 18.12.2000. The complete text can be downloaded from numerous sites; for example, it is available at http://www.europarl.eu.int/charter/default_en.htm.

Charter. The last section deals with the legal and normative coherence of the Charter and includes a chapter on the need for a European constitution.

In this introductory Chapter we will establish some of the context for the charter process and a summary of the chapters to come. We will start with a brief outline of the Charter, then proceed to some of the deficiencies of the EU from the point of view of democratic legitimacy, before addressing the relationship between rights and constitution-making in the EU. Thereafter we will provide a short summary of the ensuing chapters.

I. The Charter of Fundamental Rights

The Cologne European Council of June 1999 resolved that *A Charter of Fundamental Rights of the European Union* should be established.[4] At the Tampere European Council, the 'masters of the Treaties' decided that this Charter should be drafted by a 'body' composed of representatives from national governments, national parliaments, the European Parliament and the Commission. The importance of the composition of this body should not be downplayed. Not only was it the first case of direct inclusion of parliamentarians in a process of a constitutional nature at the European level, but it was also the first instance at which parliamentarians made up the majority of representatives (three fourths of the total). This stands in marked contrast to processes based on Intergovernmental Conferences, in which Treaty changes are the sole preserve of executive officials. Here parliaments in most cases only really enter at the ratification stage (in some cases the national electorates, through referenda, also enter then). The strong presence of parliamentarians greatly added to the legitimacy of the undertaking.

This rather innovative 'body' was mandated to work in a transparent and participatory manner, as is shown in Section II of the book. The 'body', which had renamed itself 'Convention', a name with constitutional overtones, concluded its work in less than one year. The Convention almost unanimously adopted the Charter. No final vote was held, but participants' accounts reveal that only two members of the Convention were against its adoption. The resulting text is composed of fifty-four articles that spell out the civic, political and social rights of European citizens under Union law.

The Convention held open hearings and received written submissions (totaling over a thousand). It might be a trifle optimistic to argue that the Convention contributed to the sparking of an authentically European-wide debate among the organizations of civil society, but it did try much harder to foster public debate than have Intergovernmental Conferences. Its

[4] "Presidency Conclusions of the Cologne European Council", 3–4 June 1999, European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union'. Available at http://europa.eu.int/council/off/conclu/june99/june99_en.htm.

mobilizing effects should at no rate be overestimated, but it certainly compared favourably with the intergovernmental approach that had preceded treaty changes before. This is discussed in Chapter 7.

After the Convention delivered the text, it was time for the 'masters of the Treaties' to decide what kind of status should be granted to the Charter. Before the Nice Summit of December 2000, they agreed that the final status of the Charter would not be clarified until the next Intergovernmental Conference, scheduled for 2004.[5] The three main European institutions (the European Parliament, the Commission and the Council) confined themselves to solemnly proclaim the Charter on December 7, 2000.

The unsettled legal status of the Charter was perceived as a somewhat compromised outcome, by those advocating a legally binding European catalogue of fundamental rights. A solemn proclamation was regarded by some as a formal funeral of the text, sent to the limbo of 'political declarations', where it would meet with the two constitutional projects previously set forth by the European Parliament.[6]

However, as will be seen in the below, in Chapters 2 and 10, the Charter is not without legal bite. This is so to the extent that it consolidates the existing *acquis communitaire* on fundamental rights protection. There is also an emerging institutional practice, led by the Parliament and the Commission, of citing the Charter as a reference and source of grounds for their actions and decisions. The Charter is also increasingly used as a reference drawn on by citizens, in their arguments before Courts, administrative bodies, and political institutions. Moreover, the decision to seek to found the EU on a set of fundamental rights is in itself a decision with constitutional effects, or so it will be argued in several of the chapters of this book.

II. Legitimacy Problems of the EU

Over time, the EU has developed a political system with executive, legislative and judicial functions. This development has taken place amidst vociferous and increasingly strengthened criticism. The EU has been charged with lacking legitimacy and with being highly deficient in democratic terms. However, as the EU deviates from some of the standard tenets of the nation state, we cannot simply employ the democratic standards of this entity in assessing the EU's legitimacy. It will be more appropriate to consider the

[5] 'Declaration on the Future of Europe, annexed to the Treaty of Nice', OJ C 80, of 10.3.2001, p. 85 ff.

[6] The so-called Spinelli and Hermann projects (OJ C 77, of 19.03.84, p. 53ff and OJ C 61, of 10.2.1994, p. 155 ff.).

nature of the Union as a polity first, and then, determine which standards of democratic legitimacy will be proper.

A) An Emergent Political Community

One must start by observing that the EU's executive, legislative and judicial functions are entrenched within a set of clearly defined institutions that are capable of reaching decisions and establishing rules with a direct bearing on the citizens. In its present form, this political system is a mixture of supranational, transnational, trans-governmental, and intergovernmental structures. Institutions such as the European Commission, the European Parliament (EP) and the European Court of Justice (ECJ) can be defined as 'supranational'.[7] Over the years, the European Parliament has increased its weight and power in the law-making process; at the same time, it has seen its monitoring powers and ability to hold the Commission accountable grow. All national courts are bound by Community law, and also by the rulings of the European Court of Justice. Moreover, national courts of last instance have a duty to refer cases to the European Court of Justice if doubts arise concerning the interpretation of Community law. At the same time, the Council of the Union keeps on being basically an intergovernmental institution. The decision-making system has been entrenched in a set of procedures and "the EU probably has the most formalized and complex set of decision-making rules of any political system in the world".[8] From its modest origins as an economic organisation, it has established competence to deal with most aspects of politics and policy-making, however inchoate this system may be.

The structure of the Community legal order is organized around the principles of 'supremacy' over national laws (including constitutional provisions) and 'direct effect' (of treaty provisions and regulations, but also, with some caveats, of directives). These principles ground the claim of EC law to be the 'higher law of the land' of all the Member States. Community law profoundly affects and even shapes the Member States.

The central institutions of the EU are linked to the citizens through a plethora of intermediary bodies, the main part of which are based on functional interests. But more value-based organizations and lobby groups do increasingly relate to the EU. In addition, the EU has established European citizenship, hence lending further credence to the notion of polity. Whilst deficient in relation to a democratic state, in that its character is essentially

[7] To Ernst Haas, supranationality refers to "a process or style of decision-making, "a cumulative pattern of accommodation in which the participants refrain from unconditionally vetoing proposals and instead seek to attain agreement by means of compromises upgrading common interests" (Haas cited in Robert O. Keohane and Stanley Hoffmann: *The New European Community: Decision-Making and Institutional Change* (Boulder, Colorado: Westview Press 1991), p. 280.

[8] Simon Hix: *The Political System of the European Union* (London: Macmillan 1999).

transnational, as it is based on existing rights of a legal status *vis-à-vis* Member States, the political system of the EU has developed a set of feedback mechanisms through which groups and individuals respond to outputs and mobilize to forge new ones, to reflect their values and interests.

B) The Question of Legitimacy

The evolution of the European Union into a political community gained momentum from the late 1980s. Up until the early 1990s, it was not rare to regard the Union as an economic international organisation, or as a regulatory *sui generis* organisation, slightly transcending classical international law. At the same time, the Communities were frequently portrayed as an élite game in the hands of economic interests and bureaucrats. Executives, experts and functional interests were seen to dominate the EU, with very little room for the public and for ordinary citizens. From such a functional conception of the Union, democratic legitimacy was not a real issue. The legitimacy of the Communities was related to its outcomes and conceived of as 'indirect' or 'derivative', i.e. essentially based on and conditioned on the legitimacy of the democratic nation states of which it is made up.[9]

The developments since the late 1980s have undermined the basic premise of this assertion, and brought to the fore the question of democratic legitimacy. The shifting self-conception of the Union has further encouraged such a change. The Union, in the treaties, in policy papers, and in speeches of its central officials, propounds the need for it to ensure "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

Based on these clarifications pertaining to standards and polity, we may summarise the democratic deficit of the EU in the following manner.

- For one, European citizens do not have a proper right, nor do they have the ability, to make the laws that affect them. Community law is forged through a legislative process with severe democratic deficiencies.
- Second, the final legislative power lays with the Council of Ministers, a body whose democratic representativeness is clearly inadequate, in that the ministers are accountable to their state only and not to all of Europe's citizens. (This is also a body that sparks fears of *executive dominance*.)
- Third, the European Parliament is a proper representative body, albeit one with circumscribed legislative powers and prerogatives. Even in the areas where it does co-decide legislation, it does not have the right of initiative, and does not even have the last legislative word.

[9] David Beetham and Cristopher Lord: *Legitimacy and the European Union* (London: Routledge 1998); John E. Fossum: "Constitution-making in the European Union", in Erik. O. Eriksen and John E. Fossum (eds.): *Democracy in the European Union – Integration through Deliberation?* (London: Routledge 2000), pp. 111–140.

- Fourth, there are no truly European political parties that in organisational terms reach down into and fuse the national arenas, (rendering debates and EP elections with a strong national flair). Given such constraints, it is hardly surprising that turnout at the elections to the EP, and public debate prior to them, are below what is to be democratically expected, and below what is generally the case in democratic nation-states.
- Fifth, whilst the EU has a material constitution, this is not based on a set of coherent and consistent democratic principles, and the procedures for constitutional change are democratically deficient, in that each Member State is left with a veto.

a) Entrenching Direct Legitimation?

The process of integration has led to the establishment of a political system at the European level. It has also affected or even transformed the Member States so much that the question of the legitimacy of the democratic Member State can no longer be seen as separate from or independent of the EU. The EU, as noted, has altered its normative standards, in response to these developments. In the successive Treaties, in proclamations and rhetoric, and increasingly in its political and legal institutional make-up, the EU has become committed to the principles of the modern liberal state – the social and democratic *Rechtsstaat*.

What this change in normative standards entails in practical and constitutional terms is currently being more profoundly and deeply debated than ever before. This debate on the final result of the European integration process gathered momentum in the last two years after the German Foreign Minister Joschka Fischer delivered a speech at the Humboldt University, Berlin, in 2000, where he pleaded for further federalisation of the Union. His speech received a lot of attention and elicited numerous comments.[10] The unsatisfactory outcome of the Nice European Council further served to foster constitutional debate within the Union. An unconventional, but partially institutionalised process of constitution-making was opened after the Declaration on the future of the European Union in December 2001. The so-

[10] Among key national politicians, a brief list of the contributors includes the German Chancellor, Gerhard Schröder, the British Prime Minister, Tony Blair, the French Prime Minister, Lionel Jospin, and the Greek Prime Minister Costas Simitis. Some envision the EU as a federal state much in line with the German model, whereas other would like to see it more as an intergovernmental organisation. Schröder would like to turn the Council of Ministers into an 'Upper House', whereas Jospin speaks about the Federation of Nation-States that should be understood "as a progressive and controlled manner of sharing or transferring powers at European level". For some of the academic responses to the debate see, for example, Christian Joerges, Yves Mény, and Joseph H. H. Weiler (eds.): *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Florence-Cambridge, Ma, Robert Schuman Centre/Jean Monnet Chair Harvard Law School 2001), also available at htttp://www.iue.it/RSC/symposium; see further Jürgen Habermas "Why Europe Needs a Constitution", chapter 12 below.

called Laeken process comprises a 'Constitutional Convention', synchronised national debates, an Intergovernmental Conference, and national ratification processes. Hence, the citizens of Europe are in fact in the process of actually deciding the future for Europe in legal and political terms.

b) A Citizens' Law?

The European Union already has a constitution in a material sense, i.e. a core set of basic norms concerning the making, change and adjudication of norms. The presence of such a material constitution could be reconstructed by analysing the basic constitutional documents of the Union, in the light of the jurisprudence of the Court of Justice. Such a constitution grounds a legal structure for collective decision-making. Having said that, the principled and practical status of this material constitution is controversial – something which has been related to the opaque and cumbersome character of Community law. It has not come about through the drafting of a formal constitution, and there has not been a constitutional moment in Europe. Further, the lack of a full-fledged constitution-making process has prompted Joseph Weiler to identify a 'legitimacy gap' between on the one hand, the structure in place, and on the other, the reasons for why it is there – its normative basis.[11]

If that is so, the EU needs a constitution in an ordinary sense, which determines the normative and substantive standards of law-making. As has already been said, because of its actual power and the actual effects it has on the European populace – the goals and competences of the Union, the rights and duties of the citizens – need to be spelled out within a basic, binding text. Such a text must specify the duties and responsibilities along vertical and horizontal lines: between the EU, the Member States and regional units; and among the institutions at the EU level. It must also be adopted through a constitution making process, which meets the standards of democracy, i.e. the citizens themselves are involved in the process of making the laws that they are to obey to.

The question is how far the ongoing process in the Constitutional Convention reaches, with regard to meeting these claims. The agenda for 2004, as set by the Laeken Declaration, comprises the following constitutional questions:

- the inclusion of the Charter of Fundamental Rights into the EU Treaties
- the simplification of the Treaties
- the ordering of competencies between vertical and horizontal layers of governance;

[11] Joseph H. H. Weiler: "Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision", *European Law Journal*, 1 (1995) pp. 219–258.

- the weighting of power relations between Member States and the EU institutions, and between the Council, the Commission, and the EP, and
- the future role of national parliaments in the governmental system of Europe.

III. The Rights Turn

The EU is currently involved in a 'constitutionalisation process'. This is no doubt driven forth by the particular developments within the EU pertaining to critical debate and scrutiny, closer policy integration, and further institutional development. It is also given impetus by the particularly vexing challenge of enlargement, which is a litmus test for the democratic future of Europe. But this process of constitutionalisation is also spurred on by the emerging global system of rights entrenched in national constitutions and in the European Convention of Human Rights, and further supported by the human rights instruments produced at the global level (that is, basically, the three main United Nations Declarations).

The Council of Europe has played a certain role in transforming Europe into a human rights area. But as a political institution, the Council failed to play a relevant role in the process of European integration. However, two of its main creations, the European Convention of Human Rights and the European Social Charter, have played a relevant role in fostering a common constitutional tradition of fundamental rights protection within and among European states. This rights development partially interacts with and certainly reinforces the European Court of Justice's own embrace of constitutional principles and practices from the constitutional arrangements of the Member States. The net effect can be said to be a mutually reinforcing process of norm development – from above and from below – which reflects and further amplifies the conception of the EU as subject to basic democratic standards and requirements.

The question is whether, or the extent to which, this process is taken one step further with the proclamation of the Charter of Fundamental Rights. As will be argued in more detail in Chapter 2, the text of the original treaties establishing the European Communities did not contain more than scattered references to fundamental rights. But even if the founding Treaties did not contain a proper list of fundamental rights, the Court of Justice of the European Communities established that the protection of fundamental rights was one of the basic principles of Community law back in the late 1960s. The leading case in that respect is *Internationale*.[12] Already in this case, the Court claimed that fundamental rights were to be considered part and parcel of Community law. From then on, the ECJ has built up a considerable body of

[12] Case 11/70, *Internationale*, [1970] ECR 1125.

case law acknowledging quite a number of rights as being internal to, or an integrated part of, Community law.[13]

The recognition that the protection of fundamental rights stands as one of the basic principles of Community law, and the elaboration of a concrete catalogue of such rights, reflect the progressive transformation of the Communities, i.e. the shift from economic to more comprehensive and explicitly *political* goals. One should keep in mind that *Internationale* was decided on the eve of the first enlargement of membership and the ensuing deepening of activities of the Union.

At the same time, *the rights turn* of the European Union has been conducive, not only to the constitutionalisation of Community law, but also to the adoption of basic questions of democracy and legitimacy into its political agenda. Community law was originally perceived of as a rather specialised and technical field.[14] The Rome Treaty brought in a clear legalisation of Community law, marked by the major decisions adopted by the ECJ in *Van Gend en Loos* and *Costa*. But only the recognition of fundamental rights protection as a foundational principle of Community law did expand the set of norms at the core of Community law. This has, as shown in Chapter 9 and 1, led to a slow but constant reinterpretation of the implications of economic integration: the values associated with it have to be re-weighted against other normative and ethical values, and some rights upgraded to trumps.

The affirmation of rights as a basic foundation of Community law has also helped to shape the normative standards against which Community action is judged. For assessments of these normative standards see chapter 10 and 11 (Maduro and Fossum). Once recognized, fundamental rights become means by which citizens can defend their public and private autonomies, that is their freedom to co-decide the laws they are to obey by, and their freedom to be left alone in certain matters respectively. They ensure that the citizens can autonomously form their own opinions and invoke support for their claims on political institutions and other individuals. As the Community has raised a claim for rights compliance, it has invited individuals to actually test the extent to which that claim is redeemed.

Democratic law aspires to legitimacy through the identification of its authors and its subjects.[15] The demos law is based on the right to participation, which is so to say 'the rights of rights', as it is laid out in chapter 3. This right refers to "an inclusive, communicative, will and action-competent community of affected that mutually give themselves legal

[13] An enumeration of the rights supported by the case law in Koen Lenaerts, Piet Van Nuffel, and Robert Bray: *Constitutional Law of the European Union* (London: Sweet and Maxwell 1999), pp. 548 ff.

[14] It is rather interesting to notice that the original Court of Justice of the Coal and Steel Communities was formed by both judges and lay persons with expertise on tariff questions.

[15] See Jean. J. Rousseau: *Ouvres completes* (Paris: Seuil 1967), vol. III, p. 380.

participatory rights".[16] It should be noted that such a universalistic definition has nothing to do with any comprehensive conception of the good (be it religious or secular). If it entails something, it entails freedom from religion, not any kind of indebtment to religious traditions. Close to this is the transparency requirement: The clearer the law, the more cognoscible it is.[17] Citizens' meaningful political participation in legislative processes implies a mandate to draft the law in such a way as to increase its *transparency*, i.e. the capacity of individuals to understand it. This principle is important to *accountability*, and is also closely associated with the reflexivity of democratic law.[18] The latter is conceived not as a final statement of political truth, but as an authoritative formulation that result from the democratic process. It is open to further deliberation in which it will be placed as the starting point of the debate. This is not an unqualified licence for simple rules, but for as much simplicity and clarity as possible.

Once this is acknowledged, it becomes clear why Charters can be substantive contributions to the furtherance of democracy. By making the central piece of constitutional law clearer, they enhance its transparency, and increase the chances of the further democratic refinement of these rights, hence adding to accountability.

Charters tighten the framework within which Courts argue and decide cases – another element of accountability. The rather oracular formulation of fundamental rights requires the further and frequent intervention of the same judges in order to strike the balance between conflicting rights.[19] However, Charters, as bills of rights, offer constraints on how judges operate. They thus reduce the intensity of the legitimacy gap that increases with every single case in which they give judgments that are not mechanically based on positive law.[20] In other words they increase the duty to base rulings on entrenched rights.

How far the Charter of Fundamental Rights of the European Union extends in this sense will be discussed below. These observations are also premised on the Charter being an intrinsic part of the Constitution. Several of the chapters of the book discuss the role and status of the Charter in the Constitutional Convention.

---

[16] In Angela Augustin: *Das Volk der Europäishcen Union* (Berlin: Duncker & Humblot 2000), p. 336.

[17] See, among others, Bentham´s invective against the common law. Cf. Jeremy Bentham: *Legislator of the World: Writing on Codification, Law, and Education*, edited by Philip Schofield and Jonathan. Harris (Oxford: Clarendon Press 1998), p. 20.

[18] Jürgen Habermas: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: The MIT Press1996), p. 179.

[19] Robert Alexy: *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), p. 102.

[20] Robert Alexy: "Giustizia comme correttezza", *Ragion Pratica*, 9 (1997), pp. 103–113; and Robert Alexy: "The Special Case Thesis", *Ratio Juris*, 12 (1999), pp. 209–225.

IV. Contents

As editors, we are honoured by the privilege to have the foreword written by Neil D. MacCormick, a chapter by Alan Cairns on the Canadian charter, and a concluding chapter by Jürgen Habermas. The contribution of the Scottish legal theorist and present Member of the European Parliament opens the book. It reflects on the constitutional implications of the Charter and the Constitutional Conventions. From his position as a member of the Laeken Convention, MacCormick claims that the Charter of Fundamental Rights has indeed been a vehicle of constitution-making in the Union.

Section I of the report, labelled *Why a Charter?,* deals with the fundamental question of why we have such charters. Agustín J. Menéndez, Erik O. Eriksen, and Massimo La Torre address the factual and normative background of the Charter. They seek to situate the discussion on the European Charter by exploring the justification for a Charter of rights. Particular emphasis is placed on two sets of questions, namely the role of rights vs. democracy, and the role of law vs. politics. While Menéndez traces the rights dimension in (unwritten) Community law, Eriksen discusses why a charter is needed and which are its cosmopolitan overtones. La Torre explores the possible contradiction between 'valid' fundamental rights, and the claim that they shall be democratically enacted. Last, but not least, Alan C. Cairns reflects on some of the lessons to be learnt from the experience with *The Canadian Charter of Rights and Freedoms* that was included in the Constitution Act, 1982. The Charter was introduced as a vehicle to "relocate sovereignty in the people rather than in the governments of Canadian federalism". It helped spark a massive debate on the constitutional essentials of one of the culturally most diverse countries in the world. All this renders the European-Canadian comparison an extremely interesting one.

In the second section, addressed to *Which process?,* Justus Schönlau, Olivier De Schutter, and Daniel Tarschys discuss various aspects of the process of making the Charter. This is approached by reconstructing the procedures and the debates of the Convention; among its members, in relation to the emerging European civil society, and through academic commentary. Despite obvious shortcomings, the European institutions were conscious of the need for rendering the drafting of the Charter transparent and participative. The post-Nice debate has shown that the drafting question is of greater import, and pertains to whether or the extent to which, the Convention method could become the model for the drafting of an European constitution. While Schönlau deals with the intricate deliberations over the preamble, and Olivier De Schutter analyses the role of civil society – the NGOs, Tarschys, who was a member of the Charter Convention, addresses the spectacular process of integrating different standpoints, or *goal congestion* as the author terms it, in agreeing on the text of the Charter.

Section III, grappling with the question of *Whose rights?,* is dealing with the type of rights involved and their allegiance forming capacity. Agustín José Menéndez, John Erik Fossum, and Miguel Poires Maduro analyse the status of the Charter with regard to constitution-buliding, the standing of social rights, and the onus on cultural rights. Menéndez considers what impact the Charter will have on the balance between social rights and economic freedoms. Maduro, whilst also paying attention to the different standings of rights in the Charter, analyses the tension between the Charter as a polity-building vehicle and as one that constrains supranationalism and protects national constitutional values. Fossum, in a similar vein explores whether the Charter is reflective of constitutional patriotism or of deep diversity. The latter includes an assessment of the status of the Charter in the Constitutional Convention.

As mentioned, Habermas's chapter entitled on *Why Europe needs a Constitution* provides an apt conclusion for the book. In this text, the Frankfurt philosopher deals with the need for constitutionalising human rights and with the perspective of democracy beyond the nation state.

The editors would gratefully acknowledge the contribution of the presenters and participants at the ARENA workshop in Oslo in June 2001 that laid the foundation for this book. We would also like to thank the Norwegian Ministry of Foreign Affairs, the Norwegian Research Council and ARENA for their generous financial support.

Chapter 2

Finalité Through Rights

Agustín José Menéndez

Introduction

The story of the rise of fundamental rights as a general principle of the legal order of the European Communities has been told and retold by legal scholars.[1] In a series of leading cases, the European Court of Justice (hereafter, ECJ) 'discovered' fundamental rights at the very foundations of Community law in the seventies. This dramatic transformation is usually explained by reference to the need for defending the supremacy of Community law against the threat of diversity that comes from the *national* enforcement of *national* fundamental rights.

However, such a narrative is not sensitive enough to the degree of continuity and change in the role that fundamental rights have played in the process of European integration.[2] In this chapter, it is argued that the *finalité* of European integration is the placing of rights at the core of the 'common European law'. While the protection of certain basic rights has been a major spring of integration all through the process, the explicit affirmation of rights came hand in hand with the progressive unfolding of the consequences of such a normative choice, leading to the constitutionalisation of the Communities.[3] The argument does not imply some kind of hidden hand

---

[1] See, among others, Alan Dashwood and Derrick Wyatt: *The Substantive Law of the EEC* (London, Sweet and Maxwell 1987), pp. 66 ff.; Trevor Clayton Hartley: *The Foundations of the European Community Law* (Oxford: Oxford University Press 1994), pp. 139 ff. and Dominik Lasok and John William Bridge: *An Introduction to the Law and Institutions of the European Communities* (London: Butterworths 1982), pp. 139 ff.

[2] See Brian Simpson: *Human Rights and the End of Empire* (Oxford: Oxford University Press 2001), especially chapters 12 and 13. The point was already raised by Joseph Weiler in 'Community, Member States and European Integration: Is the Law Relevant?', *Journal of Common Market Studies*, 21 (1982), pp. 39-56, at p.52: "But equally clearly the Court must have been influenced by the rising consciouness of the importance of human rights in the international field; and also *by a genuine concern for the legitimacy of the entity of which it was a part*" (my italics).

[3] When viewed in such a light, the main motivation for historical analysis will not be *causality* but *meaning*. A legal reconstruction of European integration aims not only at historical accuracy, but also at making sense of the past in *normative terms*. The analysis of social phenomena requires taking seriously the interpretation of such facts by the actors. See Max Weber: *Economy and Society*, volume 1 (Berkeley, Los Angeles and London: University of California Press 1978), at p. 4: "Sociology (in the sense in which this highly ambiguous word is used here) is a science concerning itself with the *interpretive* understanding of social action and thereby with causal explanation of its course and consequences. We speak of 'action' insofar as the acting individual *attaches a subjective meaning to its behaviour* – be it overt or

favouring the triumph of rights. My claim is much more modest, namely, that the institutional history of European integration, when considered from the Coal and Steel Community onwards, has been shaped by actors aiming indirectly or directly at *political goals*, among which are human rights protection and democracy.[4] The present configuration of Union law has been rendered possible by such concerns and actions.

In the first section, it is claimed that the early steps in the process of integration were aimed at establishing the basic preconditions for the effective protection of civic, political and social rights in Europe. The seeds of integration have been and continue to be manifold, but one central driving force was (and keeps on being) the achievement of peace and economic prosperity on the Continent. The second section aims at reviewing the role played by the ECJ. The proclamation of fundamental rights as a basic foundation of the European legal order and the later introduction of European citizenship are said to reflect the coming of political age of the Communities. The third section offers an interpretation of the actual legal standing of the recent Charter of Fundamental Rights. It is argued that it must be seen as a consolidation of positive law, and thus, as evidence of the *law in force.* One could even say that the solemn proclamation of the Charter can be construed as signalling a constitutional moment for Europe.

I. The Preconditions of Rights Protection: Peace and Prosperity

The treaties establishing the European Communities[5] contained few references to fundamental rights. Those few were to be found mainly in the Treaty on European Economic Community. The sixth recital of the preamble expressed the EEC's commitment to "preserve and strengthen peace and liberty". More substantively, Article 6 contained a clause on prohibition of discrimination on the grounds of nationality, and Article 119 stated the principle of equal pay for equal work for men and women. Such a lack of an articulated set of fundamental rights tends to be considered as evidence of the *nature* of the original Communities. The Paris and Rome Treaties are said to have been reflective of a pragmatic and modest exercise in integration (the so-called *Little Europe*, in which the United Kingdom chose not to participate). In such an entity, the new institutions would have been limited to economic issues, in contrast to the Federalist option of a full-blown political

---

covert, omission or acquiescence." On the 'internal point of view' and social disciplines, see also Neil D. MacCormick and Ota Weinberger: *An Institutional Theory of Law* (Dordrecht: Kluwer 1985).

[4] This was obvious to the so-called 'founding fathers'. See, for example, Jean Monnet: *Mémoires* (Paris: Fayard 1976), p. 358: "[Schumann] m'indiquait que le but de sa proposition [the Schumann plan] n'était pas économique, mais éminentement politique."

[5] *The Coal and Steel Community* (1951); *The Economic Community* (1957) and the *Euratom* (1957).

union. In that context, fundamental rights were bound to be regarded as a rather marginal issue.

The circumscribed reference to rights in the primary law of the Communities and the functionalism of their original design seem to be facts beyond dispute. However, they do not necessarily lead to the conclusion that *Little Europe* was not about *rights*. Arguably, rights were one of the main goals of the project (if not *the main* one). What the actual path of European integration implied was a *different strategy* of ensuring their protection.[6] Given the concrete historical and socio-economic context in Europe, *Little Europe* set itself the task of establishing the *preconditions* for the protection of civic, political and social rights in Europe.

A) Peace

The manifold projects of integration that were put forward in post-war Europe can be seen as having a common implicit goal: peace. This also applies to *the Communities*. The 1951 Coal and Steel Community (hereafter, ECSC) had as its immediate goal the establishment of a common framework for the production of two goods, coal and steel. One could speculate what concrete interests moved national diplomats to back the project.[7] But the ECSC was widely perceived as aimed at rendering impossible a third war in Europe in half a century. After all, it was rather obvious that coal and steel were not only the two pillars of the peace-time economy, but also the two main raw materials for making war at the time. Establishing common institutions to manage their production and retailing was a means of rendering impossible a new war at the heart of Europe.[8]

If that is so, *Little Europe* actually made a necessary albeit not sufficient contribution to rights-protection. War, and especially modern war, undermines the protection of life and liberty that a political community offers its citizens. Moreover, it has been pointed out that the diffuse consensus around European integration was based on the realisation that classical nation-states were no longer capable of sheltering citizens against the curse of

[6] This argument is supported by the failure of the *Treaty of Political Union* in 1954. See Richard T. Griffiths: *Europe's First Constitution* (London: Kogan Page 2000).

[7] One might observe that the most celebrated 'intergovernmentalist' scholar starts his narrative in 1955, thus not dealing with the springs of integration leading to the ECSC. This is the case with the well-known Andrew Moravcsik: *The Choice for Europe* (Ithaca: Cornell University Press 1998).

[8] See *Note de réflexion de Jean Monnet*, Argel, 5 August 1943. The Schuman Declaration is crystal clear in that respect: "The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and *will change the destinies of those regions which have long been devoted to the manufacture of munitions of war*, of which they have been the most constant victims" (my italics).

war[9]. The painful experience of two wars increased the realization that institutional structures beyond the nation–states were needed to protect fundamental rights.[10]

B) Economic Stability

Rights-protection is problematic if individuals are not guaranteed access to a minimum set of economic resources.[11] In 1945, Europe faced concrete and daunting challenges. The War had brought about devastation to all national economies, which were hardly at their prime in the twenties and thirties. National recovery strategies differed considerably, but bureaucracies tended to realise that the interdependence of European economies rendered some common framework necessary that would avoid the painful social and economic implications of national isolation, already experienced in the previous decades.[12]

Little Europe contributed a good deal to the economic stability of the fifties and sixties, which rendered possible the extensive protection of social and economic rights that we associate with the 'welfare state'. In this connection economic integration was a modest step, but one that provided reassurance to economic actors and thus established the foundations for sustained economic recovery, eventually maintained during the so-called *trente glorieuses.*[13] There is thus a basis to argue that Little Europe contributed *indirectly* to the extensive protection of socio-economic rights within welfare states.

II. The Europe of Rights from Paris to Nice

How did the Communities shift from merely establishing the preconditions for fundamental rights to directly affirming them? In this section, I consider the three basic developments to this effect. First, we should review the rise of

[9] Walter Lipgens: *A History of European Integration: The Formation of the European Unity Movement* (Oxford: Oxford University Press 1982), pp. 60–61.

[10] The persistence of the advocates of European integration bears testimony to that, even if the chain of causality is rather complex. See Bino Olivi: *L'Europa difficile* (Bologna: Il Mulino 2001), chapters 1 and 2.

[11] For example, John Rawls: *Political Liberalism* (New York: Columbia University Press 1993), p. 7.

[12] Something already pointed out by John Maynard Keynes: *The Economic Consequences of the Peace* (London: MacMillan 1971), pp. 9–11.

[13] See Alan Milward: *The Reconstruction of Europe* (London: Routledge 1984), p. 463; Antonio J Marques Mendes: 'The Contribution of the European Community to Economic Growth', *Journal of Common Market Studies*, 24 (1986), pp. 261-77; Barry Eichgreen: "Institutions and Economic growth after World War II", in Nicholas Crafts and Gianni Toniolo (eds.): *Economic Growth in Europe Since* 1945 (Cambridge: Cambridge University Press 1996), pp. 53–56 and Alan Milward: "The Springs of Integration", in Peter Gowan and Perry Anderson (eds.): *The Question of Europe* (London: Verso 1997), pp. 5–20.

individuals as subjects of European law, a departure from classical international law. Second, we need to consider that membership of the Communities was always subject to the condition of compliance with basic democratic and fundamental rights standards of protection. Third, it is necessary to revisit the series of cases through which the ECJ 'discovered' fundamental rights within the unwritten principles of Community law. Fourth, the citizenship provisions of the Maastricht Treaty redefined the Communities as a political community made up of equals, and completed the rights-based constitutional transformation of the Union.

A) The Rights-dimension of Direct Effect

The European Communities were created by the three original Treaties. These proved to be rather peculiar pieces of international law. It used to be the case that the relevant provisions of national constitutional law would mediate the invocation of the provisions of international treaties before national courts.[14] This reflects the fact that only states used to be considered as agents at the international level.[15] As far back as the early sixties, the European Court of Justice had rendered it clear that this doctrine could not be applied to Community law.[16] It did so by affirming the principles of direct effect of Treaty provisions[17] and supremacy of Community law.[18] Although these two tend to be considered in rather technical terms, both of them, and especially the first, have a clear rights-dimension.

Direct effect means the immediate enforceability of legal provisions in national courts by individual applicants. Thus, it renders possible that individuals can directly invoke clear Community provisions before national courts and get a proper remedy if their rights have been violated.[19] The immediate consequence is the empowerment of the individual as an actor of Community law, contrary to what was characteristic of international law.[20]

---

[14] Malcolm Shaw: *International Law* (Cambridge: Cambridge University Press 1997), pp. 111, 115, 120–121; Paul Reuter: *Introduction to the Law of the Treaties* (London: Kegan Paul International 1995), p. 21. But see Ole Spiermann: "The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order", 10 (1999) *European Journal of International Law,* pp. 763–789.

[15] Shaw, *ibid*., pp. 182–184 states that only in some specific Treaties (basically human rights ones) individuals are acknowledged as *direct* subjects of international law.

[16] Spiermann: *supra*, fn. 14, points that the Court could have relied on some international law precedents, such as the judgment of the Permanent Court of International Justice in the *Jurisdiction of the Courts of Danzig* opinion. Instead of breaking new ground, the ECJ might be said to have turned the exception into the rule.

[17] Case 26/62 *Van Gend en Loos*, [1963] ECR 1.

[18] Case 6/64, *Costa*, [1964] ECR 585.

[19] Paul Craig and Grainne De Burca: *EU Law* (Oxford: Oxford University Press 1998), p. 165.

[20] On the transformation of the status of individuals under modern international law, see Antonio Cassese: *International Law* (Oxford: Oxford University Press 2001), pp. 79 ff. Notice that it still comes short of the developments of Community law. This of course presupposes that Community law is a different legal order than international law, despite having been shaped by the later. On this, see Bruno de Witte: "Retour à Costa. La primauté du droit communautaire à

This might be seen as rather immaterial, given the nature of the rights granted by the original treaties and the identity of those actually pleading before the Court of Justice.[21] However, one could argue that direct effect makes it clear that individuals *have rights* (in a proper sense) directly attributed by Community law.

B) Membership

There was a tacit agreement that the European Communities could only admit democratic states that respected human rights. This was perhaps partially obscured by the fact that Article TEC 237[22] restricted membership exclusively to applicant countries that were 'European'. However, 'European' was not understood merely in a geographical sense, but also in a normative sense. The European Communities were European to the extent that they abode by the ideal of the rule of law and the respect for human rights. The Assembly's Birkelbach Report of 1962 is explicit evidence of this. In a sweeping statement, the Parliament affirmed that:

> The states in which governments are not democratically elected and in which citizens do not participate in collective decision-making either directly or through freely chosen representatives, cannot expect to be admitted to the society of peoples of the European Communities.[23]

This interpretation of Article TEC 237 was implemented in 1962, the very year that the candidature of Franco's Spain was expediently turned down. [24] Consequently, the identity of the Communities as a project of integration was to be markedly different from that of the two other competing projects, namely the free trade area of EFTA, which could accept Salazar's Portugal as a full member, and the 'really existing' (sic) socialist block of the COMECON, where civic and political rights were dismissed as petit-bourgeois prejudices. It was also in contrast to the military alliance of NATO, where Portugal and Turkey had been members since its establishment in

---

la lumière du droit international", *Revue Trimestriel du Droit Européen*, 20 (1984), pp. 425–454 and Derrick Wyatt: "New legal order or old?", *European Law Review*, 7 (1982), pp. 147–166.

[21] See C. Harding: "Who goes to court in Europe", *European Law Review*, 17 (1992), pp. 105–125.

[22] See also Articles 98 of the Treaty on the Coal and Steel Community and Article 205 of the Euratom Treaty.

[23] "Rapport de la Commission politique de l'Assamblée Parlamentaire Européenne sur les aspects politiques et institutionnels". Document 122, Janvier 1962, especially par. 25, at p. 4.

[24] On the Spanish application, see Fernando Guirao, 'Association or Trade Agreement? Spain and the EEC, 1947-64', 3 (1997) *Journal of European Integration History*, p. 103-20. On Portugal, see Nicolau Andresen-Leitao, 'Portugal's Integration Policy 1947-72', 7 (2001) *Journal of European Integration History*, pp. 25-36.

1949. Only the Council of Europe shared this particular democratic identity with the Communities.

One could speculate as to whether the openly democratic identity of the Communities stemmed from the traumatic experience of the Second World War or rather from the harrowing realities of the Cold war. The need to 'recycle' national identities, which were too closely associated with the colonial past, may also have played a role (after all, only Luxembourg had not been a colonial power). Whatever the foundation, what is clear is that the original six Member States raised the claim that they together founded a community based on democracy and respect for human rights. This self-image seems to have been relevant to the further strengthening of fundamental rights standards within Community law.

The human rights requirement has been symbolically reiterated before or immediately after every enlargement process. The accession of Denmark, Ireland and the United Kingdom was followed by the Copenhagen resolution on European identity.[25] It should be noticed that the leading fundamental rights cases of the European Court of Justice were decided immediately after 'viable' negotiations on the first enlargement had started. A more thorough 'contextual' analysis of the Court's judgments may or may not confirm whether this was just a striking coincidence in time. The Southern enlargement to Greece, Spain and Portugal was preceded by the 1977 inter-institutional declaration on the protection of fundamental rights.[26] The negotiation of the European Economic Area in the late 1980s and the enlargement to include Sweden, Finland and Austria in 1994 revived the debate over the accession of the Union to the European Convention on Human Rights (ECHR). The Eastern enlargement was given an original impulse with the establishment of the so-called 'Copenhagen criteria'; a set of standards that render the substance of articles TEU 6 and 49 more concrete.

C) Fundamental Rights as a General Principle of Community Law

The right to stand before the Court of Justice was widely made use of, and not infrequently, in order to expand the rights enshrined in Community law from remedial to substantive dimensions.

However, in several cases in the early fifties, the Court seemed to argue that the basic rights and freedoms which are protected by national constitutions were not among the provisions, the application of which, was subject to its review. The clearest statement is to be found in Stork.[27]

---

[25] "Document on European Identity, adopted by the Ministers of Foreign Affairs of the Member States of the European Communities", *Bulletin EC* 12-1973.

[26] Joint Declaration of 5 April 1977 by the European Parliament, Council and Commission on the protection of fundamental rights. See OJ C 103, of 27.04.1977, p.1.

[27] Case 1/58 *Stork*, [1959] ECR 17, par. 4.

It was not long before the Court reconsidered its reasoning. In the seminal judgement on *Stauder*,[28] the ECJ made a reference to the unwritten general principle of fundamental rights protection as a basic foundation of Community law. It did not take long before the ECJ provided an articulated formulation of this jurisprudential shift. The leading case in that respect is *Internationale*.[29] Instead of considering whether there was a conflict between European law and the standards of rights protection of the German Constitution, the ECJ rephrased the question at stake as a matter of balancing two principles of Community law. This was so to the extent that fundamental rights were *now* to be regarded as part and parcel of Community law, even if "not reflected in the text of the treaties". It is worth quoting at length from paragraph 4:

> [R]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

This case can be seen as the point of departure of a long jurisprudence in which the Court has further refined this argument. In its judgments on *Nold*[30], *Hauer*[31] and *Rutilli*,[32] the ECJ rendered more specific the sources from which it would derive the fundamental rights protected at the European level. The European Convention on Human Rights, its protocols, the European Social Charter and the *common constitutional traditions* of the Member States are the main repositories from which the ECJ has reconstructed the catalogue of Community rights.[33]

Although the *rationale* of the jurisprudential shift was very much to fill the gap resulting from the lack of appropriate protection of rights *vis-à-vis* European institutions and secondary legislation, the ECJ has also dealt with the issue as to whether some national measures can be reviewed according to Community standards of fundamental rights protection[34]. The leading cases

---

[28] Case 29/69, *Stauder* [1969] ECR 419, paragraph 7: "Interpreted in this way, the provision at issue contains nothing capable of prejudicing the *fundamental rights enshrined in the general principles of Community law protected by the Court*" (my italics).
[29] Case 11/70, *Internationale*, [1970] ECR 1125.
[30] Case 4/73, *Nold*, [1974] ECR 491.
[31] Case 44/79, *Hauer*, [1979] ECR 3727.
[32] Case 36/75, *Rutili*, [1975] ECR 1219.
[33] An enumeration of the rights supported by the case law in Koen Lenaerts, Piet Van Nuffel and Robert Bray: *Constitutional Law of the European Union* (London: Sweet and Maxwell 1999), pp. 548 ff.
[34] Tridmas associates this development with the general trend of 'spillover' of Community standards towards national measures. See Takis Tridmas: *The General Principles of EC Law* (Oxford: Oxford University Press Oxford 1999), pp. 225 ff.

in that respect might be said to be *Cinéthèque*,[35] *Demirel*,[36] *Wachauf*,[37] *ERT*[38] and *Konstantinidis*.[39] The Court has established that national measures either implementing Community measures or derogating from the fundamental freedoms, should comply with Community standards of fundamental rights protection.

The background to such a dramatic shift in the jurisprudence of the Court is a rather complex one. Most commentators have pointed to the fact that the lack of protection of fundamental rights at the European level was coming to be seen as an argument against the unqualified acceptance of the supremacy of Community law. By 'discovering' fundamental rights among the unwritten general principles of the Community, the Court masterfully avoided that risk. By defining the sources from which it would draw inspiration in spelling out the rights standards at the European level, it ensured a certain degree of autonomy for Community developments in that area.

Without challenging this canonical interpretation,[40] it is possible to add that the Court might also have sensed the transformation that the Community was about to undergo in depth and breadth. After all, *Internationale* was decided when the first enlargement of membership finally seemed within reach, and when blueprints of a deepening of the competencies of the EC were starting to circulate[41]. Moreover, it was also a time for stressing that the protection of individual fundamental rights was at the very foundation of the European project, if only because of what was happening within the (weak) alternative integration project at the other side of the Iron Curtain. Thus, a more thorough analysis of the political context within which this line of jurisprudence was developed, makes it plausible to play down a bit the *activism* of the Court, and to emphasise the extent to which judges used their margin of discretion in order to crystallise an emerging *political consensus*.

At any rate, the Court has proceeded within the framework delineated in this handful of leading cases to enumerate the rights covered by the general Community principle of rights protection. It cannot be denied that on quite a few occasions such rights are granted to individuals *qua* economic actors, something that reveals the genealogy of Community law as the law of

[35] Cases 60 and 61/84, *Cinéthèque*, [1985] ECR 2605.
[36] Case 12/86, Demirel, [1987] ECR 3719.
[37] Case 5/88, *Wachauf*, [1989] ECR 2609.
[38] Case C-260/89, *ERT*, [1991] ECR I-2925.
[39] Case C-168/91, *Konstantinidis*, [1993] ECR I-1191.
[40] Although one might add that there is a certain element of 'anachronism' built into it, as the national cases to which reference is usually made were decided after *Internationale*.
[41] See Derek W. Urwin: *The Community of Europe: A History of European Integration Since 1945* (London: Longman 1991), chapters 10 and 11.

an economic community.[42] Having said that, it must also be added that the rights protected by Community law are not merely (or even mainly) those directly or indirectly connected to the main economic freedoms enumerated in the Rome Treaty, but also to basic civic and political rights, including freedom of expression,[43] the right to privacy,[44] or religious equality.[45] It can be argued that the Court has developed an incomplete albeit substantive bill of rights.[46]

D) European Citizenship

The Treaty of Maastricht codified into primary law the general principle of fundamental rights protection crystallised by the Court. The third recital of its Preamble contained a symbolic 'confirmation' of the Member States' commitment to the principles of "liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law".[47]
Even more importantly, the Treaty introduced the concept of European citizenship. Article 8 reads as follows:

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

The provisions on European citizenship can be read as operating a change in the nature of the Community. Their deep symbolic value relates to the mutual recognition of the status of members of a political community of equals (the Union). The whole European legal order is no longer to be construed as a *contract* among economic actors, but as a *constitutional order* where relationships are mediated by a set of rights and values. That is its 'evolutionary achievement'.[48]

---

[42] See Joseph H. H. Weiler: "The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes", *Jean Monnet Chair Working Papers, 2/96* (Cambridge: Harvard Law School).
[43] See Case C-288/89, *Stichting*, [1991] ECR I-4007, paragraph 23.
[44] See Case 136/79, *National Panasonic*, [1980] ECR 2033, paragraphs 17 and ff and Case C-76/93, *Scaramuza*, [1994] ECR I-5173, paragraphs 18 and ff.
[45] See Case 130/75, *Prais*, [1976] ECR 1589, paragraphs 8 and ff.
[46] See Tridmas, *supra,* fn. 34, pp. 209 ff. and Norbert Reich: "Union Citizenship. Metaphor or Source of Rights?", *European Law Journal,* 7 (2001), pp. 4–23.
[47] Article F, section 2, introduced by the Treaty of Amsterdam (now Article 6), summarises the gist of the jurisprudence of the Court of Justice when stating that the protection of fundamental rights is one of the foundational principles of Community law.
[48] Massimo La Torre: "Legal Pluralism as Evolutionary Achievement", *Ratio Juris*, 12 (1999), pp. 182–195.

The transformative character of European citizenship is usually denied on the basis of its aggregative and derivative character.[49] With the former argument, it is claimed that Article 8 contains a mere metaphor, a re-labelling of the rights derived from the four fundamental freedoms. With the latter, it is said that the status and substance of European citizenship is fully determined by the national citizenship status.

The first claim can be rebutted by reference to two observations. First, the introduction of European citizenship *did* come hand in hand with new substantive political rights for Europeans, such as the right to vote in local elections. The fact that this precise article triggered constitutional amendments in some member states bears witness to its importance.[50] Second, Article 8 implies a change in the nature of the rights granted by Community law. One could argue that there is a progressive (although not fully consistent) shift from the exercise of fundamental economic freedoms, to non-discrimination on the basis of nationality.[51]

The second claim seems to remain uncontested. However, there are some indications that the relationship between European and national citizenship might be one of mutual influence. Leaving aside the changes operated in the conception of national citizenship,[52] one can point to the recent opinion of Advocate General Léger in *Manjit Kaur*.[53] The reasoning of the Advocate General in the case at hand leaves the door open to a possible review of the grounds on which national citizenship *should* be granted by reference to Community law.[54] If such a hint would be developed by the Court, it would undermine the claim that Union citizenship is derivative from national citizenship, as Community law would have something to say about national legislation on citizenship.

---

[49] See, for example, Jo Shaw: "Citizenship of the Union", *Collected Courses of the Academy of European Law* (I), 11 (1999) pp. 237–347.

[50] See, for example, Article 28, section 1 of the German Constitution, Article 88, section 3 of the French Constitution, amended by the *Loi constitutionnelle* no. 92–554, 25 June 1992, and reviewed by the *Conseil Constitutionel*, Décision no. 92–312 DC du 2 septembre 1992, and Article 13, section2 of the Spanish Constitution, amended by Ley de Reforma, 27 August 1992.

[51] Carlos Closa: "The Concept of Citizenship in the Treaty of the European Union", *Common Market Law Review*, 29 (1992), pp. 1137–1169; Alvaro Castro Oliveira, 'Workers and Other Persons: Step-by-step from Movement to Citizenship case-law 1995-2001', 39 (2002) *Common Market Law Review*, pp.77-122; see also Shaw: *supra*, fn. 49; Reich: *supra*, fn. 46.

[52] For the transformation of German citizenship, see Christian Joppke: "How globalisation is changing citizenship: A comparative view", *Ethnic and Racial Studies,* 22 (1999), pp. 629–652, pp. 637 ff.

[53] Case C-192/99, *Manjit Kaur*, Opinion of AG Léger delivered on 7 November 2000.

[54] The Court did not concur with the AG in its final judgment. See judgment of 20 February 2001, not yet reported.

III. The Legal Status of the Charter

The Charter of Fundamental Rights of the European Union can be seen as 'crowning' the narrative of the previous two sections. It has been acclaimed as a major achievement in the process of integration. However, the Charter has not become binding law, it has been 'merely' solemnly proclaimed by European institutions. This has rendered the status of the Charter equivocal, although, as it will be argued in this section, it does not mean that the Charter is automatically deprived of legal bite.

The members of the Charter Convention were ecumenical enough to work *as if* the Charter was to become a legally binding document. By doing so, they avoided taking sides concerning whether the Charter should formally become part and parcel of the primary law of the Communities, or whether it should remain an inter-institutional political declaration. [55] Both the symbolic meaning and the implications of each option is quite different. Opposition to further integration and to the constitutionalisation of the European Union goes hand in hand with hostility to incorporate the Charter.

However, lack of formal incorporation need not preclude the Charter from having legal bite. The Convention was given (and allegedly respected) a mandate to consolidate the existing EU law of fundamental rights, not to change or amend it. It is widely accepted that before the Charter was proclaimed, any European plaintiff could argue on the basis of the fundamental rights recognised within EU law. As was just argued, the Court of Justice has established that the protection of fundamental rights is one of the basic principles of Community law. The Charter cannot have the effect of undermining those already existing rights. Moreover, to the extent that its text is a proper consolidation of existing law, it must be seen as authoritative evidence of the law in force, and it should therefore be taken into account by legal actors when pleading their case. This argument, hinted at by the Commission,[56] seems to be supported by the emerging practice of the Court of First Instance and the Advocates General of the Court of Justice.

The Court of First Instance has already invoked the Charter of Rights as legal authority in three judgments. The Court stated that the Charter

[55] One authoritative member of the Charter Convention claims that the Charter would have legal binding effects even if only an inter-institutional agreement. See Alvaro Rodríguez Bereijo, 'El Valor Jurídico de la Carta de Derechos Fundamentales después del Tratado de Niza', 1 (2002) *Actualidad Jurídica Uría y Menéndez*, 11-24.

[56] See "Communication of the Commission on the legal nature of the Charter of Fundamental Rights of the European Union", COM(2000) 644 final, 11 October 2000. Available at http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000_0644en01.pdf.

provides additional evidence of the status and relevance of the right to good administration,[57] and the right to an effective remedy.[58]

Advocates General of the Court of Justice have established a practice of invoking the Charter as legal authority. Most of the references attribute a rather limited value to the Charter. Advocates General Geelhoed, Stix-Hackl, Siegbert Albert, Léger, Jacobs, Ruiz Jarabo and Tizzano cite the Charter as 'additional' authority to support their argument in seventeen opinions.[59] A second set of opinions gives some more relevance to the Charter. In *Wouters*,[60] Advocate General Léger supports the claim that "the European Union and its Member States are based on the principle of the rule of law" with reference to the preamble of the Charter. In *Sidney Evans*, the same Advocate General refers to the Charter in order to determine the rights to effective legal protection of the victims of untraced vehicles, specifically,

---

[57] Case T-54/99, *max.mobil Telecommunications Service GmbH v. Commission*, Judgment of 2 May 2001, not yet reported, par 48 and Case T-211/02, *Tideland Signal Limited/Comisión*, Judgment of 27 September 2002, not yet reported, par. 37

[58] See *max.mobil*, par. 57 and Case T-77/01, *Territorio Histórico de Álava - Diputación Foral de Álava, Territorio Histórico de Bizkaia – Diputación Foral de Bizkaia, Territorio Histórico de Gipuzkoa – Diputación Foral de Gipuzkoa y Juntas Generales de Gipuzkoa, Comunidad autónoma del País Vasco – Gobierno Vasco contre Commission des Communautés européennes*, Judgment of 11 January 2002, not yet reported. See par. 35.

[59] See Case C-224/98, *Marie-Nathalie D'Hoop contre Rijksdienst voor arbeidsvoorziening*, Opinion delivered on 21 February 2001, not yet reported; Case C-413/99, *Baumbast and 'R v Secretary of State for the Home Departament*, Opinion delivered on 5 July 2001, not yet reported; Case C-313/99, *Mulligan and Others v Minister of Agriculture and Food, Ireland and Attorney General*, Opinion delivered on 12 July 2001, not yet reported. Case C-49/00, *Commission des Communautés européennes contre République italienne*, Opinion delivered on 31 May 2001, not yet reported; Case C-131/00, *Ingemar Nilsson v Länsstyrelsen I Norrbottens län*, Opinion delivered on 12 July 2001, not yet reported; Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, Opinion delivered on 13 September 2001, not yet reported; Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL v Belgian State*, Opinion delivered on 13 September 2001, not yet reported; Case C-224/00, *Commission des Communautés européennes contre Republique italienne*, Opinion delivered on 6 December 2001, not yet reported. Case C-340/99, *TNT Traco SpA contre Poste Italiane SpA (anciennement, Ente Poste Italiane), Michele Carbone, Raffaele Ciriolo et Clemente Marino*, Opinion delivered on 21 February 2001, not yet reported. Case C-210/00, *Käserei Champignon Hofmeister GmbH & Co. KG contre Hauptzollamt Hamburg-Jonas*, Opinion delivered on 27 November 2001, footnote 30. Case C-353/99 P, *Council of the European Union v Heidi Hautala*, Opinion delivered on 10 July 2001, par.51, not yet reported. Case C-270/99, *Z v. European Parliament*, Opinion delivered on 22 March 2001, not yet reported. Case C-466/00, *Arben Kaba vs Secretary of State for the Home Department*, Opinion delivere don 11 July 2002, not yet reported, footnote 74; Joint cases C-187/01, *Procédure penale contre Hüseyn Gözütok* and C-385/01, *Procédure pénale contre Klaus Brügge*, Opinion delivered on 19 September 2002, not yet reported, footnotes 22 and 47. Case C-338/00 P, *Volkswagen AG contre Commission des Communautés européennes*, Opinion delivered on 17 October 2002, not yet reported, paragraph 94; Affaire C-465/00, *Rechnungshof contre Österreichischer Rundfunk e.a.* (demande de décision préjudicielle formée par le Verfassungsgerichtshof) et affaires jointes C-138/01 et C-139/01, *Neukomm et Lauermann contre Österreichischer Rundfunk*, Opinion delivered on 14 November 2002, not yet reported, footnote 3.

[60] Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, Opinion delivered 10 July 2001, not yet reported, footnote 176.

of their right to obtain compensation.[61] In *Netherlands v European Parliament and Council of the European Union*, Advocate General Jacobs invoked the Charter directly to determine the fundamental status of the right to human dignity, and the right to 'free and informed consent' of the person concerned in the fields of medicine and biology.[62] In *D and Sweden v. Council*, Advocate General Mischo referred to the Charter to argue that Member States retain the competence to decide whether or not to assimilate the legal status of partnerships to formal marriage.[63] In *Überseering BV*, Advocate General Ruiz-Jarabo acknowledged that the Charter is not formally binding, but still constitutes "the most valuable evidence on the common denominator of the basic legal values shared by Member States", in the case at hand, on the right to private property.[64] In *Unión de Pequeños Agricultores*, Advocate General Jacobs invoked the Charter, among other legal authorities, in order to make it easier for individuals and legal persons to challenge the legality of Community acts before the Court of First Instance.[65] The same Advocate General supports its argument in *GEMO* with further reference to the Charter. Its provisions will foster a reinterpretation of the jurisprudence of the Court on public aid. More specifically, it would be adequate to reappraise the concept of public aid itself, in the light of the right to access to services of general economic interest.[66]

The *boldest* uses of the Charter are to be found in *BECTU, Booker Acquaculture and Schmidberger*. Advocate General Tizzano gave considerable weight to the Charter in his opinion on *BECTU*. The issue at stake in this case was the entitlement to annual paid leave (i.e., holidays). Does the Working Time Directive[67] require the completion of a minimum period of employment with the same employer before obtaining the right to paid holidays? In paragraph 22 of his Opinion, the Advocate General argued that EU law should not be interpreted as requiring such a minimum period of employment before the right to paid annual leave can be acquired. Although the Advocate General invokes many different legal authorities to support his claim, Article 31 of the Charter, on fair and just working conditions, is central to his argument: "(...) *the Charter provides us with the most reliable*

[61] Case C-63/01, *Samuel Sidney Evans v 1. Secretary of State for the Environment, Transport and the Regions; 2. Motor Insurers' Bureau*, Opinion delivered on 24 October 2002, not yet reported, paragraphs 80; 84 and following.
[62] Case C-377/98, Opinion delivered on 14 June 2001, [2001] ECR I-7079. See par. 197.
[63] Affaires jointes C-122/99 P et C-125/99 P, *D et Royaume de Suède contre Conseil de l'Union européenne*, Opinion delivered on 22 February 2001, not yet reported. See par. 97.
[64] Case C-208/00, *Überseering BV contre NCC Nordic Construction Company Baumanagement*, delivered on 4 December 2001. See par. 59.
[65] Case C-50/00, *Unión de Pequeños Agricultores v. Council of the European Union*, Opinion delivered on 21 March 2002, not yet reported. See par. 39.
[66] Case C-126/01, *Ministre de l'économie, des finances et de l'industrie/GEMO SA*, Opinion delivered 30 Abril 2002, par. 124.
[67] *Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time*. OJ L 307, of 13.12.1993, pp. 18–24.

and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right."[68]

In *Booker Acquaculture*, Advocate General Mischo invoked the Charter in order to prove that the right to property, as established in the common constitutional tradition of the Member States, did not necessarily entail the right to compensation in cases where the authorities destroy property to prevent the outbreak of animal disease. Although the Charter is cited as secondary legal authority, Advocate General Mischo added some important reflections on the democratic qualities of the process through which the Charter was drafted:

> I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.[69]

In *Schmidberger*, AG Jacobs considered the weighting and balancing of economic freedoms (in the case at hand, of the free movement of goods) and fundamental rights (the right to free expression and to assembly in this case). The Advocate General sketches the frame of reasoning within which such conflicts should be assessed in the future. It is worth quoting at length:

> This appears to be the first case in which a Member State has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the Treaty. Such cases have perhaps been rare because restrictions of the fundamental freedoms of the Treaty are normally imposed not to protect the fundamental rights of individuals but on the ground of broader general interest objectives such as public health or consumer protection. It is however conceivable that such cases may become more frequent in the future: many of the grounds of justification currently recognised by the Court could also be formulated as being based on fundamental rights considerations.[70]

---

[68] Case C-173/99, *Broadcasting, Entertainment, Cinematographic and Threatre Union (BECTU)*, Opinion delivered on 8 February, [2001] ECR I-4881. See par. 26. (My emphasis)

[69] Joined Cases C-20/00 and C-64/00, *Booker Aquaculture Ltd trading as Marine Harvest McConnell and Hydro Seafood GSP Ltd. vs. The Scottish Ministers*, Opinion delivered on 20 September 2001, not yet reported. See par. 126.

[70] Case C-112/00, *Eugen Schmidberger Internationale Transporte Planzüge vs Austrian Republic*, Opinion delivered on 11 July 2002, not yet reported, par. 89. The weighting and balancing is undertaken in the following paragraphs.

The Opinion of AG Geelhoed in *American Tobacco* is also worth noting. In the referred case, the Court was asked to review the 'European constitutionality' of a directive on the composition and manufacturing of tobacco. The Advocate General referred to the Charter as a source of knowledge of the shape and extent of the right to private property, and specifically, of intellectual property rights and property rights to trade marks. But she qualified such a reference, and expressed her doubts as to whether Article 17 should be regarded as a proper consolidation of the *acquis communitaire*.[71] This question is more specifically considered *infra*.[72]

The Spanish and the Italian Constitutional Court have also cited the Charter as legal authority. The former referred to the Charter in a case where the protection of personal data was at stake. It should be noticed that the Spanish judgment was rendered by the plenary of the Court, and that it was rendered public some days *before* the Charter was solemnly proclaimed.[73] The Italian Court made a less bold reference to the Charter in a judgment rendered in April 2002. The case concerned the status of the right to privacy, and more specifically, the legal conditions under which the police could register images within a private home, and therefore, use them as evidence in a later legal proceeding. The Court argued that the Charter, even if 'lacking a binding effect' should be considered as one of the relevant legal sources, "given that it reflects the principles common to the European legal orders".[74] The Vice-President of the European Court of Human Rights, Judge Costa, invoked the Charter in his separate but concurrent opinion in *Hatton*. Costa referred to the provisions on the protection of the environment (Article 37) in order to show that the case law of the ECHR is not unique in paying increasing attention to environmental issues.[75]

The emergent practice of referring to the Charter as legal authority is also accepted by the other institutions of the Union, especially the Commission and the European Parliament. A non-exhaustive search in Eur-Lex resulted in more than two hundred acts of the institutions in which reference was made to the Charter. As of April 1st, 2002, ten proposed regulations and twenty proposed directives contain references to the Charter. Almost twenty resolutions of the Parliament invoke the Charter, while MEPs made reference to the Charter in more than fifty written questions.

---

[71] Case C-491/01, *The Queen/Secretary of State for Health ex parte: American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, supported by: Japan Tobacco Inc. and JT International SA*, Opinion delivered on 10 September 2002, par. 259.

[72] See further chapter 11 of this volume.

[73] Judgment 292/2000, 30 November 2000, not yet reported, paragraph 8. The legal authorities invoked by the Spanish Court were Directive 95/46, on data protection, and Article 8 of the Charter, which "states and spells out this right, and mandates public authorities to ensure its protection".

[74] Judgment 135/2002, 24 April 2002, 'Tribunale di Alba', paragraph 2.1. *in fine*.

[75] Case of *Hatton and Others v The United Kingdom*, Judgment delivered on 2 October 2001, not yet reported. See page 19 of the provisional transcription of the judgment.

The growing tendency of citing the Charter as legal authority supports the argument put forward in this section, namely, that the Charter of Rights has legal bite even if it is formally not binding. One could even argue that once such a practice has been established, it in itself becomes an argument to claim that the Charter has legal bite, independent of the reasons that led to the establishment of the practice in the first place. Once it becomes commonplace to refer to the Charter in judgments, regulations, directives, opinions, resolutions or communications, legal representatives and advocates of sectional interests will invoke the Charter without further ado about its formal status.

At the time of writing, it can be added that the formal incorporation of the Charter of Fundamental Rights in an eventual European Constitutional Treaty seems rather likely. A specific working Group within the Laeken Convention was established with the mandate to determine whether and how the Charter should be incorporated into primary Community law.[76] A clear majority emerged within the Group, and also within the plenary of the Convention, in favour of the actual incorporation of the whole set of articles of the Charter into the primary law of the Union. The final report of the Working Group strongly recommends the incorporation of the Charter. [77] It is not too adventurous to claim that incorporation of the Charter has become a necessary condition for a proper constitutionalisation of the Union.[78] However, no clear agreement has been reached on *how* the Charter will be rendered legally binding. The staunch opposition stemming from the government delegations of the United Kingdom and of Ireland might probably force a compromise diluting the symbolic implications of the incorporation of the Charter. For example, it has been suggested that the text could be merely annexed as a Protocol to the Constitutional Treaty, instead of its fifty four articles being incorporated into its main text.[79] The legal value of such an annexed Charter will stem from a provision similar to the present Article 6 TEC. In such an article, the Charter will be referred to as *one* of the sources of Community law on fundamental rights. [80]

---

[76] CONV 72/02, Mandate of the Working Group II (Charter).

[77] See CONV 354/02, 'Final Report of the Working Group II'. See also the debate on the report in the Plenary of the Convention. Meeting of 29 October 2002, verbatim report available at http://www.europarl.eu.int/europe2004/textes/verbatim_021029.htm.

[78] See chapter 11 of this volume.

[79] Some British scholars have argued that the incorporation of the full text of the Charter will be *technically problematic*. The Charter provisions could comprise a half or a good third of the total number of articles of the Constitutional Treaty. This is considered as *unbalanced*. Such an argument is rather weak, as it does not take seriously the fact that many national constitutions present a similar proportion between the total number of articles and those devoted to fundamental rights provisions.

[80] One might be allowed to point out that such a solution will run contrary to the declared reasons of the opponents of the Charter. In fact, the mere enumeration of the Charter as *one* of the sources of protection of fundamental rights in Community law will increase the margin of discretion of the European Court of Justice. This is so to the extent that no text will minimally

Conclusions

In this chapter, it has been argued that the protection of fundamental rights has become a founding principle of Community law. This implies that the European Union claims itself to be a mature political community. This is perhaps remarkable, but not astonishing. Although the original Treaties did not contain more than very specific references to individual fundamental rights, it has been shown that the ethos of European integration was grounded on the assuring of their effective protection. Therefore, it is possible to reconstruct the history of the European integration as the progressive affirmation of the principle of fundamental rights protection. In that sense, the Charter of Fundamental Rights is a crowning moment. The solemn proclamation of the Charter constitutes the symbolic means of signalling that the legitimacy of the Union is to be unconditionally based on the aspiration to effectively protect and promote individual fundamental rights.

However, the Charter must also be seen as a constitutional beginning. As it becomes increasingly influential in depth and breath, the Union cannot keep on drawing its democratic legitimacy indirectly, i.e. from the Member States. It is a well-established premise of the democratic theory of law that the main source of legitimacy is political participation, to the extent that only the latter can effectively bridge as far as possible the gap between the authors and the subjects of the law. By means of proclaiming the rights that they mutually acknowledge each other, Europeans have rendered visible the true *finalité* of European integration. But explicating rights is to be seen as a pre-condition for their actual exercise. Neither constitutional fathers and mothers nor courts can substitute Europeans in their actual exercise of rights, civic and social, and foremost, political. Genuine politics presupposes fundamental rights, but fundamental rights cannot (should not) replace politics. [81]

---

frame the discretion of judges. Therefore, it will render the protection of the fundamental rights of European citizens *even more dependent* on European judges.

[81] On this, see Marcel Gauchet : *La democratie contre elle-même*, (Paris, Gallimard, 2002), especially chapter 1.

Chapter 3

Why a Constitutionalised Bill of Rights

Erik Oddvar Eriksen

Introduction

Constitutions allocate competences, positions and powers. They specify fundamental procedural conditions for democratic legislation. Constitutions guarantee civil and political rights, they regulate the activity of political bodies by stating rules for elections, representation, and decision-making, and they establish areas of competence, terms and qualifications. As a rule a written constitution, which cannot be amended by simple majority vote, contains checks and balances, horizontal and vertical separation of powers, overrepresentation of small jurisdictions, judicial review and delegation clauses. Rights are an important part of constitutions as they empower the citizens vis-à-vis the legal authorities. With the rise of modernity the citizens were equipped with rights that could be used against the state, and a conspicuous feature of late modernity is the many efforts undertaken to protect human rights internationally.

We witness a significant development of rights and law enforcement beyond the nation state. This development is spurred by the global system of rights entrenched in the UN Convention and the European Convention of Human Rights (ECHR). That a new order is underway is perhaps most clearly revealed in the initiative taken to incorporate a *Charter of Fundamental Rights of the European Union* into the new Treaty of the EU. At the December 2000 Summit in Nice the Charter was solemnly proclaimed. The eventual incorporation into the Treaties is postponed until 2004 – to be decided by the next IGC. All articles on the rights of EU citizens in the Treaty of the Union have now been collected in one document of 54 articles, inspired by the ECHR (without replacing it), the Social Charters adopted by the Council of Europe and by the Community and the case-law of the the European Court of Justice (ECJ). The Charter adds to the fundamental rights of Union citizens by expressing the principles of humanism and democracy.[1]

The position of human rights is strengthened internationally but it is a development that is not without difficulties. Human rights are universal as

[1] Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. OJ C 364, of 18.12.2000.

they appeal to humanity as such. They transcend the rights of the citizens because they apply to all moral human beings. But with their expansion within international law they have gained an authority that limits the state's self-legislation. There is a tension between democracy and human rights, because so far the principle of popular sovereignty has only been made applicable to the rule of particular societies; it is at this level that democracy is institutionalized, as a national community that governs itself autonomously. Democracy is in other words limited to the nation-state, an entity which is primarily geared to self-maintenance. This brings it into a potential conflict relationship with other states. Human rights, for their part, no longer follow from democratic states' self-legislation only, as is the case with the declarations that were the result of the French and the American revolutions. They also follow from international legislation under the direction of, among others, the UN, and enforced by special human rights courts. Hence human rights politics can be seen as undemocratic. The rights have not been decided by the ones affected by them.

The question arises whether a Charter of Fundamental Rights at the regional level, and in particular in the EU, can close the gap between abstract human rights and the need for democratic legitimation. Is it a means to resolve the tension between popular sovereignty and human rights? I will address this question and present two sets of arguments in favour of a constitutionalised bill of rights in the EU. The first one has to do with reducing arbitrary norm enforcement, which is the recurring problem of human rights politics. The second has to do with the *normative validity* of human rights. How can they be defended and are they really a necessary ingredient of democratic rule? It has been argued that human rights politics is detrimental to social integration. But human rights are not merely abstract principles which, when positivated, secure negative freedom. When they are constitutionalised and turned into fundamental rights they contain a guarantee for equal freedom to all citizens.

Some object that we do not need the Charter while such rights already are protected by the established conventions and constitutions in Europe. Even if the Charter merely represents consolidation of existing law I maintain that it is important because it is a means to enhance the legal certainty of the citizens, reduce arbitrariness and moral imperialism and to institutionalize the right to justification. However, as the principle of popular sovereignty points to a particular society, and human rights point to an ideal republic, only with a cosmopolitan order can the problem of human rights politics be resolved. A constitutionalised bill of rights at the regional level is hence a contribution to global democracy. It provides a more consistent basis for the EU's external policy, and can thus be seen as a step towards a democratic world order.

I start by briefly addressing the context and the content of the Charter (I-II). I proceed by addressing the actual tension between human

rights and democracy and the need for domesticating international relations (III). Can the Charter be seen as a way to reduce the legitimacy gap of human rights politics or is it merely symbolic (IV)? In the following part of the article I discuss the normative foundation of human rights and the alleged tension between law and morality involved in constitutionalizing human rights (V). Law may be seen as complementing morality, but is there really *a right to human rights (VI)*? In this endeavor I follow a suggestion from Rainer Forst to see the right to justification as the most basic human right (VII). I also take this to be a strong argument for further democratization of the EU (VIII–IX).

I. A Charter for the Future

The decision to frame a Charter of Fundamental Rights was taken at the Cologne European Council (June 3–4 1999). In October 1999, at the Tampere European Council, it was decided to establish a 62-member Convention (headed by the former German President Roman Herzog) to draft a Charter of Fundamental Rights of the European Union.[2] This was the first time that the EP was represented in the same manner as the Member State governments and the national parliaments in a process of a constitutional nature.

The Charter contains provisions on civil, political, social and economic rights. Put together, these are intended to ensure the dignity of the person, to safeguard essential freedoms, to provide a European citizenship, to ensure equality, to foster solidarity, and to provide for justice. The number and range of rights that are listed are comprehensive. In addition to provisions which most charters and bills of rights hold and which pertain to such clauses as the right to life, security, and dignity, there are numerous clauses that seek to respond directly to contemporary issues and challenges. For instance, there are clauses on protection of personal data (Article 8), freedom of research (Article 13), protection of cultural diversity (Article 22), protection of children (Article 24), right to collective bargaining (Article 28), and protection of the environment (Article 37). The Charter also contains a right to good administration (Article 41). It contains several articles on non-discrimination and equality before the law. Article 21, section 1, states that

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership

[3] The Convention consisted of (a) representatives of the Head of State or Government of the Member States, (b) one representative of the President of the European Commission, (c) sixteen members of the EP, and (d) thirty members of the Member State Parliaments (two from each of the Member States). It was led by a Presidium of five.

> of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Section 2 contains a clause banning discrimination on grounds of nationality. In the preamble it is also stressed that "(...) [i]t is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments (…)". Its forward looking quality is perhaps most strikingly underscored in Article 3, which prohibits the cloning of human beings. It is an unequivocally modern set of rights directed to the problems of pluralist and complex societies in a changing environment. The Charter is sensitive to the problems of globalised risk societies. But why does the EU need a bill of rights to bolster its activity?

II. A Commitment to Direct Legitimacy

The founding treaties of the European Community contained no reference to fundamental rights. However, as integration deepened and as the Community came to have more far-reaching effects on the daily lives of citizens the need for explicit mention of fundamental rights was recognized. The European Court of Justice (ECJ) developed this idea[3] as the Community is not bound by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in the same way as the subscribing Member States. As is also laid out by Tarshcys' contribution to this book, the EU is not itself a signatory to the Convention. It has been argued by many over the years that the power of the legislative and administrative bodies of the Community needs to be constrained by a set of fundamental rights, in the same way as constitutions and the ECHR constrain the authorities of the Member States. The problem was attended by the IGC leading to the Maastricht Treaty (TEU) and in what is now Article 6(2) of the Amsterdam Treaty recognition of the concept of fundamental rights is enshrined. By this clause the EU is obliged to respect the rights guaranteed by the ECHR and deriving from the constitutional traditions of the Member States. However, this is rather weak and imprecise:

> The rights regime of the European Union is inconsistent in terms of content as well as variable in terms of implementation and levels of enforcement between Member States.[4]

[3] The leading Case is *Internationale*, 11/70, [1970] ECR 1125

[4] Andrew Duff: "Towards a European Federal Society," in Kim Feus (ed.): *The EU Charter of Fundamental Rights* (London: Kogan Page 2000), pp. 13–27.

The principle of legal certainty is only secured in a limited sense at the Community level. The citizen can not be sure what rights she really is entitled to. Not all the Member States, for example, have ratified all the Convention's subsequent protocols and the ECJ has no clear and incontestable foundation on which to base its rulings. Another source of the initiative of making a charter of fundamental rights is the argument that the EU which is "(…) a staunch defender or human rights externally" (…) "lacks a fully-fledged human rights policy".[5] When basic institutions are lacking in the EU with regard to human rights, it is difficult to *lead by example*. The ensuing document is intended to do something about this deficiency. The Charter substantiates the rights mentioned in Article 6(2) of the Treaty on European Union (TEU) by spelling out the specific obligations of the institutions.

The proposed Charter can be read as one of, if not the most, explicit statement on the EU's commitment to *direct legitimacy* that has ever been produced in the EU. That is that the institutions and rights provided to the citizens by the EU should in themselves provide the necessary basis for legitimate governance. It speaks to the claim that the EU is a full-blown polity. In reality, the Charter is a clear manifestation of the EU as a political entity and not a market. The four (market) freedoms are not listed in the Charter, whereas there are a wide range of social rights.

However, the Charter is not without ambiguities and constraints. It only applies to the actions of the EU institutions and the Member States' authorities, and it is not designed to replace other forms of fundamental rights protection. Article 51 (Section 2) states that the Charter does "not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties". Section 1 states that the Charter will only be made to apply to the "institutions and bodies of the Union" and only to the Member States "when they are implementing Union law". It is not binding, even though it is written *as if* "it were a binding legal text" following a proposal made by member Cisneros and endorsed by president Herzog.[6] I am not going to address these problems here, nor the problems of the status of the rights, which are fundamental and which are merely ordinary rights, or the lack of legal coherence and conceptual stringency.[7] Rather I focus on the need for a charter or a constitutionalised bill of rights, which appears to be

[5] And further "(…) the Union can only achieve the leadership role to which it aspires through the example it sets" (Philip Alston and Joseph H. H. Weiler: "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights," in Philip Alston, Mara S. Bustelo, and James Heenan (eds.): *The EU and Human Rights* (Oxford: Oxford University Press 1999), pp. 4–5.)

[6] See CHARTE 4105/00. See aslo Piet Eeckhout: "The Proposed EU Charter of Fundamental Rights: Some Reflections of its Effects in the Legal Systems of the EU and of Its Member States", in Feus, *supra*, fn. 4, pp. 97–110, at p. 98.

[7] For this analysis the reader may consult chapters 2, 9, and 10 in this volume.

the most likely long-term outcome of the chartering process.[8] I will start with the basic problem of international human rights protection which pertains to it non-institutionalized form.

III. Domesticating International Relations

What is at stake with the institutionalization of human rights, is the sovereignty of the modern state as laid down in the Westphalian order in 1648. Prohibition of violence against sovereign states was here prioritized over the protection of human rights, this order safeguarded the rulers' *external sovereignty*. The international order is founded on the principles of co-existence and non-interference among sovereign states.[9] The latter principle, however, can not prohibit genocide or other crimes against humanity and can not easily be sustained from a moral point of view.

The principle of state sovereignty which international law after the Treaty of Westphalia 1648 warranted, is a principle that has protected the most odious regimes. It was only when Hitler-Germany attacked Poland that World War II broke out, not when the persecution of Jews started. This also indicates the limitations of nationally founded and confined democracy. While human rights are universal and refer to human beings as such, they transcend the rights of the citizens, democracy refers to a particular community of legal consociates who come together to make binding collective decisions. The validity of the laws is derived from the decision-making processes of a sovereign community. The propensity to adopt rights, then, depends on the quality of the political process in a particular community.

When peoples' basic rights are violated, and especially when murder and ethnic cleansing (ethnocide) are taking place something has to be done, our moral consciousness tells us. The growth in international law ever since its inception and in particular the system of rights embedded in the UN represent the transformation of this consciousness into political and legal measures. The purpose of these institutions was first to constrain the willpower of the nation states in their external relations to other states. The

---

[8] Koen Lennaerts and Eddy E. De Smitjer: "A 'Bill of Rights' for the European Union", *Common Market Law Review*, 38 (2001), pp. 273–300; Agustín. J. Menéndez: "Chartering Europe: The Charter of Fundamental Rights of the European Union", *Journal of Common Market Studies*, 40 (2002), pp. 471–490; see also chapter 2 in this contribution.

[9] However, see Michael Walzer: *Just and Unjust Wars* (New York: Basic Books 1977), p. 89: "(...) [O]f course not every independent state is free, but the recognition of sovereignty is the only way we have of establishing an arena within which freedom can be fought for and (sometimes) won. It is this arena and the activities that go on within it that we want to protect, and we protect them, much as we protect individual integrity, by marking out boundaries that cannot be crossed, rights that cannot be violated. As with individuals, so with sovereign states: there are things that we cannot do to them, even for their own ostensible good."

politics of human rights by means of systematic legalisation of international relations implies the domestication of the existing state of nature between countries. Institutions above the nation-state are needed to constrain the internal willpower of the state, i.e., the power exerted over its citizens. Article 28 of *The United Nations Universal Declaration of Human Rights* (1948) made it clear that there is a right to a lawful international order:

> Everyone is entitled to a social and international order in which rights and freedoms set forth in this Declaration can be fully realized.

In the last decades we have witnessed a significant development of rights and law enforcement beyond the nation state. Human rights are institutionalised in international courts, in tribunals and increasingly also in politico-judicial bodies over and above the nation state that control resources for enforcing norm compliance. Examples are the international criminal tribunals for Rwanda and the former Yugoslavia, The International Criminal Court, the UN and the EU. In addition, European states have incorporated 'The European Convention for the Protection of Human Rights and Fundamental Freedoms' and a good deal of its protocols into their domestic legal systems. These developments are constrained by the limitations of the international law regime as it is based on the principle of unanimity and as it lacks executive power. The Charter of the United Nations prohibits violence but forbids intervention in the internal affairs of a state. However, this is not the only difficulty of an international human rights regime.

The problem with human rights as the sole basis for international politics, is due to their non-institutionalized form. Human rights exhibit a categorical structure – they have a strong moral content: 'Human dignity shall be respected at all costs!' Borders of states or collectives do not make the same strong claim – 'they do not feel pain'. In case of violations of basic human rights, our human reason is roused to indignation and urge for action: When compared with crimes against humanity, and when all other options are exhausted, the international society should be enabled to act, even with military force. But human rights when conceived abstractly do not pay attention to the context – e.g. to the specific situation and ethical-cultural values – and may violate other equally valid norms and important concerns. As human rights do not respect borders or collectives, as they appeal to humanity as such, they may threaten local communities, deep-rooted loyalties and value-based relationships. When you know what is RIGHT, you are obliged to act whatever the consequences. This is among the problems of human rights politics. It stems from the cosmopolitan universalistic idea of doing good regardless of borders which set the European nation states on

missions defending and proclaiming human rights across the globe, a mission that the USA sought to take over in the late twentieth century.[10]

Yet this cosmopolitan mission faces significant difficulties. The general problem comes down to the following: in concrete situations there will be collisions of human rights as more than one justified norm may be called upon. To choose the correct norm requires interpretation of situations and the balancing and weightening of rights.[11] Another problem with the politics of human rights is its arbitrariness at this stage of institutionalisation. They are enforced at random. Some states are being punished for their violations of human rights while others are not. There are sanctions against Iran and Iraq, but not against Israel or China. Some can violate international law with impunity. The politics of human rights is criticised for being based on the will-power of the US and its allies, not on universal principles applied equally to all. Human rights talk may very well only be window-dressing, covering up for the self-interested motives of big states. All too often ideals are a sham – they are open to manipulation and interest-politics and renewed imperialism. Human rights politics is often power politics in disguise.

The solution to the twin problem of the politics of human rights – the problem of norm collisions and of arbitrariness – is positivisation and constitutionalisation, which confers upon everybody the same obligations and connects enactment to democratic procedures.[12] Increasingly, this is actually taking place as human rights are incorporated both in international law and in the constitutions of the nation states. As a consequence human rights are no longer merely moral categories but are positivised as *legal rights* and made binding through the sanctioning power of the administrative apparatus of the states. This has changed the very concept of sovereignty. The growth of international law limits the principle of popular sovereignty.[13] Today for (at least some) states to be recognized as sovereign they have to respect basic civil and political rights. In principle, then, only a democratic state is a sovereign state and in such a state the majority can not (openly) suppress minorities.

---

[10] Klaus Eder and Bernhard Giesen: "Citizenship and the making of a European Society," in Klaus Eder and Bernhard Giesen (eds.): *European Citizenship between National Legacies and Postnational Projects* (Oxford: Oxford University Press 2001), pp. 245–269, at p. 265.

[11] Cf. Klaus Günther: *The Sense of Appropriateness: Application Discourses in Morality and Law* (New York: State University of New York Press 1993); Robert Alexy: "Discourse Theory and Human Rights", *Ratio Juris*, vol. 9, (1996), pp. 209–235.

[12] Unless the danger prevails that agents and "leading beneficiaries of globalisation will construct notions of world order and transnational citizenship which allow them to pursue their interests without much accountability to wider constituencies" (Richard Falk: "The Making of Global Citizenship", in Bart Van Steenbergen (ed.): *The Condition of Citizenship* (London: Sage 1994), pp. 127–140. See also Andrew Linklater: *The Transformation of Political Communities* (Oxford: Polity Press 1998)).

[13] Karl O. Apel: *Auseinandersetzungen in Erprobung des transzendental-pragmatischen Ansatzes* (Frankfurt: Suhrkamp 1998), at p. 834.

Human rights are important because they directly point to a basic constitutional principle of modern states, whilst also constituting a critical reference point for their validation. The *democratic Recthstaat* is founded on the rights of the individual, her autonomy and dignity. It claims to derive legitimacy from the protection of the individual – her freedom and welfare. This is also seen in all liberation movements and claims for secession: they are first recognised by international society when they can show that basic rights are violated by the power-holders. There has been a remarkable shift in the discourse of how and when to intervene in the 1990's.[14]

> Interventions once aroused the condemnation of international moralists. Now failures to intervene or to intervene adequately in places such as Rwanda or Sierra Leone do.[15]

However, the problem of arbitrariness in the enforcement of norms in the international order is not resolved. The urgent task is to domesticate the existing state of nature among belligerent nations by means of human rights, i.e., the transformation of international law into a law of global citizens – cosmopolitan law.[16] Thus there is a need for political institutions that are capable of non-arbitrary and consistent norm enforcement, and in the advent of a democratised and empowered UN, regional institutions like the EU are of the utmost significance. Does the Charter of Fundamental Rights contribute to a cosmopolitan order?

IV. Chartering the EU

As mentioned the Charter is not as yet legally binding, but "[i]n practice, (…) the legal effect of the solemn proclamation of the Charter of Fundamental Rights of the European Union will tend to be similar to that of its insertion

[14] On the reasons for and against intervention see e.g., Charles R. Beitz: *Political Theory and International Relations* (Princeton: Princeton University Press 1979), pp. 69 ff.; John S. Mill: *On Liberty* (Harmondsworth: Penguin 1859/1974.); Michael Walzer: *Just and Unjust Wars* (New York: Basic Books 1977) and Michael Walzer: "The Moral Standing of States. A Response to Four Critics," in Charles Beitz (ed.): *International Ethics* (NJ: Princeton University Press 1985), pp. 217–237; Hauke Brunkhorst (ed.): *Einmischung erwünscht?* (Frankfurt: Fischer 1998).

[15] Michael Doyle: "The New Interventionism", *Metaphilosophy*, 32 (2001), p. 212.

[16] On this see e.g. Karl O. Apel: "Kant's 'Toward Perpetual Peace' as Historical Prognosis from the point of view of Moral Duty", in James Bohman and Matthias Lutz-Bachmann (eds.): *Perpetual Peace. Essays on Kant's Cosmoplitan Ideal* (Cambridge: The MIT Press 1997), pp. 77–111; Jürgen Habermas: *Die Einbeziehung des Anderen. Studien zur politischen Theorie* (Frankfurt: Suhrkamp 1996); Jürgen Habermas: *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: The MIT Press 1999), pp. 46–59; Jürgen Habermas: "The War in Kosovo. Cosmopolitical Lessons", *Constellations*, 6 (1999), pp. 263–272; cf. Hauke Brunkhorst, Wilhelm R. Köhler and Matthias Lutz-Bachmann (eds.): *Recht auf Menschenrechte* (Frankfurt: Suhrkamp 1999).

into the Treaties on which the Union is founded".[17] The Charter reflects the well established rights- and value basis of the Community. The Charter "(…) is a legally enforceable text which underlines the importance of the rule of law in the EU and it is the ultimate proof of the focal role that EU citizens have come to play in the European integration process".[18] Moreover, since it codifies existing positive law in one sense it may be seen as already binding. It has also increased its legal bite over a short period of time as "(…) the Court of first Instance has already invoked the Charter of rights as legal authority in two judgements" and several advocates generals of the Court of Justice have "(...) established a practice of invoking the Charter".[19] In addition it seems, as Neil MacCormick makes clear in the Foreword to this volume, already agreed that it should be incorporated in the future constitution of the EU. This provides the background for the ensuing assessment of the Charter. It may be a means to resolve the tension between sovereignty and human rights for the following reasons:

First, the Charter marks the *EU as a polity* with extended domains of competencies. It is not merely an instrument for solving the problems of the Member States or a common market. The EU has clearly moved beyond an intergovernmental organisation as is evidenced in the supranational character of the legal structure. Due to case law eventually *the doctrine of Supremacy* (1964) states that, in case of disputes between a national norm and an EC legal norm, the national norm must give way; and *the doctrine of Direct effect* (1962, 1974), says that under certain conditions EC norms (Treaty law and secondary legislation) confers rights on citizens that must be protected in national courts. In many regards it is a political entity performing many of the functions of the nation state. The Commission, the EP and the ECJ form a new supranational power-wielding regime with far reaching consequences for the ordinary man and woman in Europe. EU lawmaking affects the interests and values of the European citizens and the identities of the Member States. Consequently, the rights of the citizens need safeguards. The Charter denotes the EU as an entity built upon the individual, her freedom and well-being, with rights that should not be overrun by collective welfare claims or national concerns. The citizens of Europe have now, in principle, achieved rights over and above their native states.

Second, the Charter enhances the *legal certainty* of the citizens of Europe as everybody can claim protection for the same interests and concerns. A bill of rights secures consistent rights enforcement in the EU area. This is required as different conventions, treaties and constitutions are at work and court rulings in these cases often reflect national traditions and customs. A bill of rights even one that is not more than the codification of

[17] Lennaerts and De Smitjer, *supra*, fn. 8, pp. 298–299.
[18] *Ibid.*, pp. 300.
[19] Menéndez, *sup*ra (2002), fn. 8 at p. 474.

existing law decreases the room for discretion of the ECJ and national courts when dealing with EC law of fundamental rights. The need for legal certainty has also been accentuated by the recent development towards an actual common security policy in the EU – Justice and Home Affairs. It is in policy fields such as migration law, border control, police cooperation etc. that the rights of the citizens most often are threatened.[20] One may also add that the process of enlargement may gain from raising the standards with regard to protection of human rights as they temper the abiding temptation to stress merely compliance with the economic and administrative accession criteria on the side of the applicant states. Regarding this it should be remembered that the strengthening of human rights in the Communities at an earlier stage went hand in hand with the plans for enlargement towards Southern Europe – Spain and Portugal.[21] Indeed at every major turning point in the integration process – deepening or widening the Communities – there has been increased attention to rights.

Third, the Charter is *a public document* and it has been shaped, interpreted and enacted by political actors. The process is close to a constitutional one. This new regime moves the system of human rights beyond the present one which is dominated by the courts. The Charter is made by the representatives of the citizens of the Member States. It has been openly deliberated by representatives of national governments and national parliaments, the Commission and the EP and has also received inputs from NGOs.[22] To some extent it has also been subjected to public debate.[23] The Charter is politically decided and so implies a *democratisation of human rights politics*. This is important for justificatory reasons. Even though the

[20] The EU-Committee of the House of Lords in England urged for a legal binding charter based on the ECJ as the legal authority, because: "Within the framework established by the Maastricht and Amsterdam Treaties, there is greater scope than before for EU actions and policies to impinge on individual rights and freedoms." In its first report on human rights, the Committee emphasised that 'the Community has no criminal jurisdiction, no police, no criminal courts, no prisons' and that a number of ECHR provisions would thus be largely inapplicable within the Community. While it remains the case that the Community has no explicit powers in these areas, important changes have taken place: "(…) here is provision under Title VI of the TEU, for closer operational co-operation between police and customs officials, also involving Europol, in the prevention and combating of crime. While such co-operation remains essentially inter-governmental there is greater involvement of Community institutions and a greater choice of legally binding instruments" (House of Lords European Union Committee Session 1999–2000, Eight Report: The EU Charter of Fundamental Rights, 2000).

[21] Joint Declaration of 5 April 1977 by the European Parliament, Council and Commission on the protection of fundamental rights (OJ C 103, of 27.04.1977, p 1.)

[22] The process is unique in the EU. There are reports of processes of a 'genuine' dialogue within the Convention which led to change of positions over time. See chapter 6 in this volume.

[23] The drafting of the Charter took place in an open manner, in contrast to the IGC-2000 process, which was mainly conducted behind closed doors. The Convention consulted with other organisations and conducted open hearings to representatives from civil society. Hundreds of NGOs submitted briefs to the Convention on different aspects of the Charter. It received more than 1000 documents from more than 200 different sources. These briefs can be accessed on the Internet. (http://db.consilium.eu.int/df/default.asp?lang=en).

Charter is not made directly by the people or by a constitutional convention it is made by representatives of the people and is important in order to curb the impression of, and also the actual power, of judge made law in the EU. Legitimacy is also the reason for the European Council's decision in Cologne: "Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy (…) There appears to be a need (…) to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens".[24] In general a charter containing a bill of rights increases transparency and comprehensibility for ordinary citizens and makes existing law liable to public scrutiny. It enhances the possibility of public reflection and democratic deliberation. But direct participation is also need, and also for another reason. Participatory rights and further democratization of the EU are needed because in situations where rights collide a correct interpretation of the situation is needed to choose the appropriate norm. This requires democratic participation because only hearing of all affected parties can provide and adequately informed basis for resolving hard questions. What is right or good for A in one context, may be wrong or bad for B in another context. Human rights require democratic participation and public deliberation to be correctly implemented.[25]

Fourth, the Charter process represents a very important development in the constitutionalisation of the EU: "Europe could finish its federalizing process under the flag of human rights."[26] From a cosmopolitan point of view such rights are important as they contribute to establish democratically controlled institutions at a regional level to cope with global problems. By this 'international law' is pushed beyond the limitations of the Charter of the United Nations which on its behalf prohibits violence, and thus aggression against other states, but forbids the intervention in the internal affairs of a state (Article 2.7). As mentioned the EU has clearly progressed beyond this initial stage of a purely voluntary association. It is an entity with strong *supranational elements* equipped with executive power. This is evidenced in the supranational character of the legal structure, which is supported and enhanced in particular by the European Court of Justice. In its rulings, it has as mentioned long asserted the principles of supremacy and direct effect. National law gives way to Community law, and there is a need for safeguarding the rights of the citizens. Through its institutions, it forms a supranational regime with extended competencies and certain democratic qualities. Alongside these legal

[24] http://db.consilium.eu.int.DF/intro.asp?=de

[25] Hauke Brunkhorst: "Menschenrechte und Souveränität – ein Dilemma?", pp. 157–175, and Frank I. Michelmann: "Bedürfen Menschenrechte demokratischer Legitimation?", pp. 52–65, in Hauke Brunkhorst, Wilhelm R. Köhler, and Matthias Lutz-Bachman (eds.): *Recht auf Menschenrechte* (Frankfurt: Suhrkamp 1999).

[26] Armin Von Bogdandy: "The European Union as Human Rights organization? Human Rights and the Core of the European Union", *Common Market Law Review,* 37 (2000), pp. 1307–1338, at p. 1337.

developments further democratization is greatly needed to redeem the basic idea of human rights of free and self-governing citizens. A constitutionalised bill of rights provides the EU with the legal competence required to carry on being a firm promoter of human rights externally. It is difficult to be a champion of cosmopolitan law and urge other to institutionalise human rights when one is not prepared to do so oneself.

But what is the precise connection between rights and popular rule? Why is a bill of rights really needed for democracy to prevail?

V. Why Not a Charter?

In controversies over human rights one frequently encounters not only the accusation that this is a means for western societies to maintain hegemony over the rest of the world, but also that human rights abstractly framed threaten value-based communities and primordial bonds of belonging.[27] Human rights are 'foreign' and when not mediated by the facts and values of the context in which they are to be implemented they may have counter-productive effects. They in fact endanger the very values and subjects they are intended to protect.[28] Likewise, some communitarians and civic-republicans claim that legal rights entrenched in constitutions are not needed and/or that they have negative effects on social integration. The latter pertains to the fact that they constrain politics as they relieve the political agenda of certain questions and they enhance the propensity to act egoistically. Rights constrain democracy and undermine the ability to act collectively. They entitle the citizens to act against each other and against the polity as they no longer are bound to ground or justify their actions morally. They can act upon rights solely in order to safeguard their self-interests.[29] And, "the more rights the judges award the people as individuals, the less free the people are as a decision-making body".[30] I will first address the latter objection, i.e. the relationship between law and morality, and then the former by asking if there really is a right to human rights.

---

[27] For a discussion on this see Axel Honneth: "Is Universalism a Moral Trap. The Presuppostions and Limits of a Politics of Human Rights", in James Bohman and Matthias Lutz-Bachmann (eds.): *Perpetual Peace. Essays on Kant's Cosmoplitan Ideal* (Cambridge: The MIT Press 1997), pp. 155–178.

[28] These concerns are often informed by Hegel's criticism of Kant's idea of a cosmopolitan right, see Kant 1797/1996. However Hegel's critique was not of cosmopolitanism as such but of the propensity of turning it into a fixed order: "It is defective only when it is crystallized, e.g. as a cosmopolitanism in opposition to the concrete life of the state" (Georg W. F. Hegel: *Hegel's Philosophy of Right,* trans. Thomas M. Knox (Oxford: Oxford University Press 1821/1967), p. 134, §209).

[29] Michael J. Sandel: *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press 1982).

[30] Michael Walzer: "Philosophy and Democracy", *Political Theory,* 9 (1981), pp. 379–399, at p. 391.

Jeremy Waldron claims that there is an inherent contradiction involved in the process of constitutionalisation of rights as they build upon the concept of individual autonomy – on the concept of a morally responsible person – while at the same time constitutionalise distrust of them as responsible political actors.[31] Constitutionalised rights relieve the actors of the need for virtue and community feeling that the observance rights, so to speak, presuppose. This can be rebutted, as "(…), there is no inconsistency in saying that human beings are able to think and to act morally on the one hand, and that they quite often commit appalling acts on the other".[32] Even political anarchists need the law to co-ordinate their common affairs. "Even a society of well-disposed angels, uniformly anxious to do right, needs a system of laws in order to know the right thing to do".[33]

The articulation of virtues, institutions of civil society and public deliberation are important to bring about the civility, trust and solidarity required for democratic participation, but modern law based on individual rights entitlements in the form of legal statutes is equally important. Law is a medium for stabilising behavioural expectations. It constrains defection and free riding, because it connects non-compliance with sanctions.[34] It is a way to solve the problem of collective action. There may be reasons to oppose even a rational agreement, and nobody is obliged to comply with collective norms unless all others also comply. Pure virtues and unsanctioned social norms are too weak to govern behaviour in larger collectivities, and are too weak instruments to harness individual behaviour. They need to be supplemented with legal statutes that connect breaches and defection with sanctions. Agreements have to be institutionalised and terminated in formal contracts. This is why the role of the law is such a conspicuous feature of governance in modern societies. It makes agreements into rights, laws or contracts, which make them binding on all the members in the same way. Law is not merely a symbolic system, it is also an action system that confers upon all the same obligations.[35] The constitutional state sanctions norm violations and bans the use of violence, and therefore encourages parties to act morally and in a communicatively rational manner.[36] Law complements morality and enhances the moral role of legal systems. Instead of threatening morality and virtuous action, rights and obligatory enforcement of action norms make such behaviour possible. This applies to legal rights in general.

---

[31] Jeremy Waldron: "A Right-Based Critique of Constitutional Rights", *Oxford Journal of Legal Studies*, 13 (1993), pp. 18–51.
[32] Cécile Fabre: "A Philosophical Argument for a Bill of Rights", *British Journal of Political Science*, 30 (2000), pp. 77–98, at p. 91.
[33] Tony Honoré: "The Dependence of Morality of Law", *Oxford Journal of Legal Studies*, 13 (1993), pp. 1–17, at p. 3.
[34] Habermas, *supra* (1996), fn.16.
[35] *Ibid.*, p. 107.
[36] Karl O. Apel: *Auseinandersetzungen in Erprobung des transzendental-pragmatischen Ansatzes* (Frankfurt: Suhrkamp 1998), p. 755.

Human rights, for their part, are moral claims, and as such can be justified with regard to the duties that bind the free will of autonomous persons; in other words with regard to the autonomy, or the integrity and dignity, of the individual. Moral rights protect the autonomy of the self-legislating individual and can be seen as having intrinsic validity. However, human rights are not merely moral entities; they are also entrenched in positive legal norms as judicial rights. From this angle one achieves another perspective on the relationship between democracy and human rights.

VI. Equal Right to Freedom

The most important difference between basic rights and human rights is that the latter concerns humans as such, while the former – *basic rights* – are given to individuals in so far as they are citizens, members of a state.[37] Human rights have a moral content that is not absolvable in positive law, and thus have pre-positive validity: they exist, so to speak, prior to political communities and they constitute the reference point for criticising positive rights.

> Even if human rights can be realized only within the framework of the legal order of a nation state, they are justified in this sphere of validity as rights for all persons and not merely for citizens.[38]

Even though human rights can be morally justified with reference to universalistic validity claims, they are also embedded in positive, legal norms as *judicially* enforceable rights.[39] When enacted or positivised they are turned into fundamental or basic rights. They become legally binding on all right-holders and confer upon all the legal duty to respect them and thus to mutually grant all consociates the same rights. According to Kant, a central characteristic of "the system of rights" is that the modern *form* of liberal, civil law contains a guarantee of *equal right to freedom* to all citizens. The state is a union of people under laws, and the constitutions and laws adhere to the principle of political right:

---

[37] Otfried Höffe: *Vernunft und Recht* (Frankfurt: Suhrkamp 1996), at p. 51.
[38] Jürgen Habermas: "Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight", in James Bohman and Matthias Lutz-Bachmann (eds.): *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal* (Cambridge, Mass.: The MIT Press 1997), pp. 113–153, at p. 138.
[39] Habermas, *supra*, (1996), fn. 16.

> A constitution allowing the greatest possible human freedom in accordance with laws which ensure that the freedom of each can coexist with the freedom of all the others.[40]

The basic liberal principle that what is not prohibited is allowed makes it possible to combine each individual's free choice with anybody else's free choice. Individual rights guarantee the actors' liberty to do as they please – negative freedom. They allow selfishness and irrationality because they exempt the individuals from the burden of justification. The citizens are given rights that protect their private autonomy, that is, the right to pursue their goals as long as they are within the confines of the law. This is because freedom in modern societies not only has a moral character, i.e., securing autonomy, but also a juridical one, i.e., securing a legal domain of non-interference.

Kant's point is that citizens, who recognize each other as free and equal, must give each other the same and the greatest possible degree of freedom if they want to regulate their co-existence by means of the law. In Habermas' opinion this follows when *the discourse principle* is applied to the form of the law. This reads as follows:

> Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses".[41]

Only laws that can be accepted by everyone in an open debate can be considered legitimate, and only laws that guarantee as much as possible and equal freedom to everyone will be able to pass such a test. The citizens can only regulate their co-existence legitimately by means of the law in so far as they are also given the opportunity of participating in the legislative process. Thus we see that the rights cannot only guarantee citizens' private autonomy, they also so to speak demand and presuppose their *public autonomy.*

This has the additional implication that the citizens are free to take their own particular stand towards the law. They must be free not only to choose whether they wish to comply with the law or not, but also whether they want to take a stand at all. They can be forced neither to approve nor to participate if the law is to claim legitimacy.[42] Everyone must have the opportunity to choose *exit* or to not have an opinion at all. The discourse principle warrants this at it gives the citizens the right to submit only to the laws that they approve of in a rational discourse. With this the citizens are not

---

[40] Immanuel Kant: *Political Writings*, edited by Hans Reiss (Cambridge: Cambridge University Press 1991), at p. 23.
[41] Habermas, *supra* (1996), fn. 16, at p. 107.
[42] *Ibid*. p. 121.

only free to say yes or no to a legal norm, they are also free to decide *if* they want to say yes or no at all. It is the law, that is, the existence of judicial rights, that realizes freedom. Negative freedom is made possible by the law. The legal principle stating that what is not prohibited is allowed, guarantees the citizens of a democratic constitutional state individual freedom to act. This is a freedom that is secured by the law, which relieve the actors from the burden of justification and guarantee a freedom of action within the confines of the law.

The form of the law provides relief from the burden of justification. But the democratic constitutional state by implication depends on a population and citizens that to no great extent make use of their right to non-justification and non-participation, for example by not taking part in elections. It requires a certain dosage of *civic virtue* and a population that values freedom and emotionally and 'patriotically' embraces constitutional rights. Rights have to be rooted in practical social relationships where they can be interpreted and operationalised in relation to concrete needs and interests of human beings in order to have bearing on actual problems and conflicts. It is with regard to experiences of injustice, disrespect and humiliation that claims to rectification and compensation can be made legitimately. This requires *contextualisation*.[43] The liberal constitutional state is not self-sufficient, and on this the discourse theorists and the communitarians agree.

What is more, rights should not be thought of as possessions or as innate protections of private interests, rather as what compatriots grant each other mutually when they are to govern their co-existence by law.

> Rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another.[44]

Or as Axel Honneth puts it can we "only come to understand ourselves as the bearers of rights when we know, in turn, what various normative obligations we must keep vis-à-vis others: only once we have taken the perspective of the 'generalized other', which teaches us to recognize the other members of the community as the bearers of rights, can we also understand ourselves to be legal persons, in the sense that we can be sure that certain of our claims will

[43] These concerns are often informed by Hegel's criticism of Kant's idea of a cosmopolitan right, see Kant 1797/1996. However, Hegel's critique was not of cosmopolitanism as such but of the propensity of turning it into a fixed order: "It is defective only when it is crystallized, e.g. as a cosmopolitanism in opposition to the concrete life of the state." (Georg W. F. Hegel: *Hegel's Philosophy of Right,* trans. Thomas M. Knox (Oxford: Oxford University Press 1821/1967), at p. 134, §209)).

[44] Iris M. Young: *Justice and the Politics of Difference* (Princeton, N. J.: Princeton University Press 1990), at p. 25.

be met".[45] Thus, rights are inter-subjective entities, which entail recognition of reciprocity and depend on successful socialization and individuation processes to work adequately. Persons capable of respecting others' rights and of using their own rights in a responsible way are required for rights to function as general protectors of interests.

Individual rights are both a result of and prerequisite for democratic legislation. Fundamental rights are not only an instrument for the collective will-formation, but have an absolute status. They have a value in themselves. They precede and limit collective will-formation, at the same time as they must be justifiable in an open discussion. Individual rights must therefore not be regarded as limitations on the actors' private autonomy or on the autonomy of the legislator, as is frequently the case in the way liberals see them.[46] There is a dialectic here: a qualified common will can only be formed when the individuals are free, but it is only by means of the collectivity, i.e., the community and its resources, that the conditions for free opinion-formation can be established. In Habermas terms democracy and the constitutional state are equally basic and co-original. Individual freedom, which human rights guarantee, is both a condition for and a result of the legislative process. When the laws are made by the legislative authority in which everyone participates, they cannot be unjust, according to Kant.. In such an endeavour human beings are treated as an end in themselves and they cannot do injustice to themselves.

But how can human rights be defended in their own right, and not only as an 'instrument' for democracy? An answer is required as our moral intuition tells us human rights need protection regardless of their contribution to democracy. Here I follow a proposal made by Rainer Forst.[47]

VII. The Right to Justification

One may ask if the conceptual strategy discussed above fully grasps the normative dimension of human rights. Habermas' conception of 'private autonomy' is, with the danger of oversimplification, framed on *the right not to communicate*. Legal rights relieve the actors of the obligation to provide

[45] Axel Honneth: *The Struggle for Recognition. The Moral Grammar of Social Conflicts* (Cambridge: Polity Press 1995), at p. 108.

[46] Cf. Isaiah Berlin: *Four Essays on Liberty* (Oxford: Oxford University Press 1969).

[47] Rainer Forst: "Die Rechtfertigung der Gerechtigkeit. Rawls' Politischer Liberalismus und Habermas' Diskursteorie in der Diskussion", in Hauke Brunkhorst and Pieter Niesen (eds.): *Das Recht der Republik* (Frankfurt: Suhrkamp 1999), pp. 105–168; Rainer Forst: "The Basic Right to Justification: Toward a Constructivist Conception of Human Rights", *Constellations* 6 (1999), pp. 35–60. See also the articles in Hauke Brunkhorst, Wilhelm R. Köhler and Matthias Lutz-Bachmann (eds.): *Recht auf Menschenrechte* (Frankfurt: Suhrkamp 1999).

justifications – there is *a right to be left alone*.[48] As we have seen Habermas conceive of the core content as being moral, but there is no justification of the intrinsic value of human rights. A wider justification is needed, because positive laws can be unfair and because meta-legal perspectives are called upon to change and rectify legal orders and make new laws. It is also required because we need to know more specifically why human rights are *necessary*. Why do we need human rights and to what extent can we claim to be protected by them? Lastly, a normative foundation is required in order to refute the accusation that human rights are particularistic and 'Western' values. There is need for a culturally neutral but at the same time culturally sensitive defence of human rights.

Demands for human rights are moral demands as they are put forward to secure vital interests. They are always concretely justified with regard to someone's frustrated need or unsatisfied interest and they are articulated when people are maltreated or humiliated. Human rights do not merely exist or not exist, they are not given by God(s) and they are not merely discovered. Rather they are created and recognised by people in certain situations and are enacted by political and judicial decision-making bodies.[49] They arise in difficult and severe situations and are responses to normatively demanding hardships.

> The conception of natural rights, sacred and inherent in man, was written into the constitutions of the eighteenth, nineteenth, and twentieth centuries, not because men had agreed on a philosophy, but because they had agreed, despite philosophic differences, on the formulation of a solution to a series of moral and political problems.[50]

Experiences of injustice which are common to all human beings give rise to demands for change and rectification – reiteration – and beneath claims to particular undertakings, to social and political remedial actions, there is a need for understanding and explanation. Why is this happening to me, and why do I have to obey rules and norms detrimental to my own interest? Actors may have no abstract or philosophical idea of what it means to be a 'human being', but in protesting they believe that there is at least one fundamental human-moral demand which no culture or society may reject:

---

[48] Jean Cohen: "Democracy, Difference, and the Right to Privacy", in Seyla Benhabib (ed.): *Democracy and Difference. Contesting the Boundaries of the Political* (Princeton, N.J.: Princeton University Press 1994), pp. 187–217.

[49] Wilhelm R. Köhler: "Das Recht auf Menschenrecthe", in Hauke Brunkhorst, Wilhelm R. Köhler, and Matthias Lutz-Bachman (eds.): *Recht auf Menschenrechte* (Frankfurt: Suhrkamp 1999), pp. 106–124.

[50] Robert McKeon: "The Philosophic Bases and Material Circumstances of the Rights of Man", *Ethics,* 58 (1948), pp. 180–187, at p. 181.

the unconditional claim to be respected as someone who deserves to be given justifying reasons for the structures to which he or she is subject.[51]

At the heart of human rights demands is the need of every human being for meaning and reasons – as a universal feature of human kind.[52] Religions may be seen as a response to this need as they are representations of meaning: they explain man's place in the world and provide justification of evil or injustice. This need is also, so to speak, built into the very grammar of human language. In every society, in every social relationship, the demand for justification and explanation is present; and every human being expresses this demand from the earliest years. 'Why is this happening to me? What have I done wrong? Is this just?'

In modern societies the demand for meaning also takes the secular form of reason giving in the first person singular and translates into the justification of political authority. In the words of Claude Lefort "(…) modern democracy invites us to replace the notion of a regime governed by laws, (…) by the notion of a regime founded upon *the legitimacy of a debate as to what is legitimate and what is illegitimate* – a debate which is necessarily without any guarantor and without any end".[53] According to this way of reasoning, every social order must be prepared to give reasons for their existence if they are to be recognized by their members. Hence the duty to give justification needs no further justification – it corresponds to the democratic right to be given reason that no one can reject with reciprocal and general arguments. It is from this basis, recognising *the right to justification*, that other rights may be justified. Thus the basic principle of democracy: Only norms and statutes that are justified to those affected and that are accepted by all in a free debate can claim to be truly legitimate.[54]

VIII. 'The Right of Rights'

From this normative point of view there are also reasons for institutions beyond a particular state in which individuals have obtained membership and which protect the basic rights of the citizen. A state can fail to respect a 'correct' understanding of human rights and can also fail to respect individuals with no membership rights, and, indeed, other states' legitimate interests.[55] For the rights of the *world citizen – kosmou politês* – to be

[51] Forst , *supra*, 1999, fn. 47, at p. 40.
[52] Cf. Robert Alexy: "Discourse Theory and Human Rights", *Ratio Juris*, 9 (1996), pp. 209–235, on the place of reason-giving. Raising claims to correctness is the most universal human experience.
[53] Claude Lefort: *Democracy and Political Theory* (Cambridge: Polity Press 1988), p. 39.
[54] For this see, Habermas, *supra,* fn 16 (1996), p. 41.
[55] "Since human beings are both moral persons and citizens of a state, they have certain duties in an international context. As a moral person, a member of the community of all human beings, one is a 'world citizen' insofar as one has not only the duty to respect the human rights of

respected human rights need to be institutionalized in bodies above the nation states that actually bind individual governments and international actors. Such bodies must have the use of resources which make threats credible. This is needed for consistent and impartial norm-enforcement.

However, the problem of democratic legitimation lingers as long as those affected by the norms do not have a say in the legislative process. Technocracy and paternalistic practices of norm-enforcement represent barriers to an adequate human rights politics and contradict the core principle of human rights, i.e., that the individual has a right to justification – and the principle of democracy understood as government by the people. Hence "the right of rights" is the right to participation, which is needed to avoid technocracy and paternalism in formulating and enforcing rights. "'The great right of every man', said William Cobbett, 'the right of rights is the right of having a share in the making of the laws, to which the good of the whole makes it his duty to submit'".[56] Or as it is put in *The French Declaration of the Rights of Man and Citizen* (1789), Article 6:

> Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives, in its formation; it must be the same for all, whether it protects or punishes. All citizens, being equal before it, are equally admissible to all public offices, positions, and employments, according to their capacity, and without other distinction than that of virtues and talents.[57]

In this perspective, constitutionalising the Charter of fundamental rights in the EU is an important step in subjecting human rights politics to popular sanctioning, not least because of a certain democratic input in the Union. The system of representation and accountability in the EU already in place gives the citizens at least a minimal input in the process of framing and concretizing the rights to be enacted. What is required then are rights which are specified with regard to the explicit duties of power-wielding bodies – i.e., bodies with executive power. The Charter observes this right not only in securing a right to vote and to political accountability but also in stating, as mentioned, the right to good administration which includes, "the obligation of the administration to give reasons for its decisions". (Article 41, section 2). On the other hand, the grant of a "Right to vote and stand as a candidate at

---

others, but also a duty to help them when their rights are violated, as when the basic rights of human beings are systematically disregarded in another state". See Forst 1999, *supra*, fn 47 at p. 53.

[56] Cited in Jeremy Waldron: *Law and Disagreement* (Oxford: Oxford University Press 2001), at p. 232.

[57] Walter Laquer and Barry Rubin: *The Human Rights Reader* (New York: New American Library 1979), p. 119.

election to the European Parliament" (Article 39) is of limited value while the EP is not the supreme legislative body in the Union. Then at the same time as the Charter outlines the basic rights of citizens, it directs us to the deficiencies of the EU as a political order.

The EU is in need of a more fundamental democratic reform. It seems that this have to include abolishing the pillar structure (because pillars II and III are intergovernmental and essentially outside the realm of Community law), redistributing and delimiting the competences of the decision-making bodies, empowering the EP, making the Council into a second chamber, the Commission into a government headed by an (EP) elected president, etc. Hence there is need for Treaty amendments and constitutional reform for the Charter to play an elevating role in making the EU into a union of citizen – a true republic.

IX. Cosmopolitan Democracy

According to cosmopolitans, the urgent task is to domesticate the existing state of nature between countries by means of human rights, the transformation of international law into a law of global citizens. The parameters of power politics have already changed, as we have seen. Legal developments over the last century have been remarkable and one of their main thrusts has been to protect human rights. They are no longer only present in international declarations and proclamations. Increasingly they are entrenched in power wielding systems of action and in actual policies pursued. Aggressors can now be tried for crimes against humanity, and offensive wars are criminalized. Naked power is tamed by law. Almost nobody can any longer be treated as a stranger devoid of rights.[58]

Nevertheless, the problem of arbitrariness in the enforcement of norms in the international order is not resolved. For a true republic to be realised it must be possible for citizens to appeal to bodies above the nation state when their rights are threatened. A particular state can fail to respect human rights as well as other states' legitimate interests. In practical terms there is a tension between human rights and democracy since the latter only exists at the level of the nation-state, i.e., in particular states with very different political cultures; while human rights are ensured by non-democratic bodies such as courts and tribunals or, what is more often the case, enforced by the US and its allies. Only with a cosmopolitan order – democracy at a supranational world level – can this opposition finally find its solution. This is so because human rights point to an ideal republic.

[58] Hauke Brunkhorst: "Einleitung: Welbürgerrecht in einer Welt der Bürgerkriege", in Hauke Brunkhorst (ed.): *Einmischung erwünscht?* (Frankfurt: Fischer 1998), pp.7-12. at p. 7; Niklas Luhmann: *Das Recht der Gesellschaft* (Frankfurt: Suhrkamp 1983), p. 573.

Consequently, The UN needs to be democratised and made into a polity with sanction-based means of law-enforcement. Law should be made equally binding on each of the Member States, otherwise human rights politics can easily degenerate into empty universalistic rhetoric or a new imperialism. States may continue to violate human rights with impunity.

Regarding democratisation, one option is to supplement the existing order with territorial representation – one person, one vote – either as a second assembly or by reforming the General Assembly.[59] However, the institutionalisation of rights and decision-making bodies on lower levels is required by the cosmopolitan model. Intermediate institutions in a global democratic world order – regional bodies capable of collective action between the UN and the nation state – are needed to be able to establish democratically controlled institutions to cope with global problems. That is why regional unions such as the EU are normatively attractive.

Summa summarum, there is a tension between international law's recognition of sovereign states and the regulative idea of equal rights and freedom for all which is reflected in various practical oppositions between democracy and law, and between domestic and foreign policy. The growth of international law limits the principle of popular sovereignty. However, legal orders are orders of peace; and one might say that the principle of popular sovereignty is being undermined by international human rights politics as well. The principle of popular sovereignty, according to the cosmopolitan agenda, is in the process of being transformed into a law for the citizens of the world. In this process the Charter of Fundamental Human Rights is an important step in institutionalisation of a framework of a cosmopolitan order where violations of human rights can be persecuted as criminal offences according to legal procedures.

[59] In addition one may include compulsory jurisdiction before the International Court, new agencies of economic co-ordination and the establishment of an effective accountable, international military force in the short-term objectives of cosmopolitan democracy. See David Held: *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press 1995), p. 279.

Chapter 4

The Law Beneath Rights' Feet
Law, Politics and the Charter of Fundamental Rights of the European Union*

Massimo La Torre

Introduction

In this chapter, I will consider the relationship between law and politics. The aim is to arrive at a conclusion as to what dynamics may arise between the validity of fundamental rights and the production of legal norms (first and foremost, legislation). On such a basis, I shall assess the scope and impact that the Charter of fundamental rights of the European Union has or may have on the on-going process of building a supranational political system.

Two more particular goals will also be pursued. Firstly, I will discuss and refute a purely voluntaristic conception of the State; that is, a narrowly positivistic interpretation of Kant's legal philosophy. Secondly, I will underline two related phenomena. On the one hand, the intimate relation between law and politics once the law is 'constitutionalized' or becomes 'mild'[1] and, on the other hand, the relation between law and politics, once the latter becomes 'civilized', or reflects a civil conversation.

I. The Emergence of Politics as an Autonomous Field

Machiavelli, Hobbes and Kant can be said to be the three most important thinkers who sensed the changes characterising the emergence of modernity (i.e. the separation and autonomisation of the political sphere). At the same time, it seems beyond doubt that their work has shaped and influenced modern conceptual models of politics. It seems to me that the work of each of the three authors signals a further stage in the process of autonomisation of *politics*.

Machiavelli makes the Prince, and therefore political power, a-moral, that is, liberated from its traditional ties to morals and religion. Having said that, it is also true that Machiavelli's thinking is still very much rooted in a particular contextual or societal setting. This is so for the mere reason that

* Original translation by Iain L. Fraser.
[1] Cf. Gustavo Zagrebelsky: *Il diritto mite* (Torino: Einaudi 1993).

he is conceived of as an actual man, indeed, a man of certain 'virtues' or special capacities. In short, the Prince lacks the necessary abstractness to make politics a separate thing, remote from the concrete dynamics of social life and from its movements and passions.

The next step is taken by Hobbes (and in some respects also by Rousseau). Hobbes does not conceive of political power in a flesh-and-blood creature, but in a symbolic, abstract, collective entity. Through his conceptions of *Common-wealth* and the *Leviathan*, Hobbes is the first to sketch out what subsequently was to be called the State. *Common-wealth*, community, State and Leviathan are very closely connected concepts. Although the abstract political entity is understood as separate from the will of the individuals, it is nevertheless also incorporated in it, hence the difference between the 'one will' and the 'will of all'. But, it might be objected, where the novelty is here, when the whole of political medieval thought, and still more, 'classical' Greek and Roman thought, talk of nothing else but *civitas*, *res publica*, *polis*, in short, 'community'? The difference is twofold. First, and this is a fundamental difference, the terms *civitas* or *polis*, express, for the Romans and the Greeks respectively, the concept of society as a whole, not just the political sphere. The political is entirely immersed in society. Hobbes, however, understands *Common-wealth* not just as any type of society, but as one constructed on the basis of the political dimension. *Common-wealth* corresponds in natural law language to civil society, i.e., distinct from natural society, or the state of nature. Whereas the Aristotelian tradition conceives of society as a given and political power as an internal element or product thereof, natural law thinkers face a problem of how to conceptualise society, since they postulate – even if only hypothetically – the existence of a previous stage, the state of nature, which is characterised by precarious and instable relations between human beings. These relationships are then stabilised through an outside intervention, as opposed to the Aristotelian model, where stability is intrinsic to the social relations themselves. This external intervention is the action of a political power located outside and beyond social relations. Society, as organized civil society, is accordingly – despite the pact that gives rise to it – produced by political power; it exists, is possible, and lasts in time because of it. Moreover, it is ultimately to be identified with it. Hence the equation that has assumed the force of commonplace: State equals society.

Thus, the 'modern' natural law model becomes explicit or finds its clearest formulation in Hobbes. While in the 'classical' tradition society is built up from itself, is natural (an organism, in the familiar parable of Menenius Agrippa), in modern natural law thinking society is constructed on the basis of political power, and is artificial (it is a machine)[2]. Hobbes gives

[2] For the opposition between an Aristotelian and a natural law model of the relationship between society and politics, cf. Norberto Bobbio: *Il modello giusnaturalistico*, in Norberto Bobbio and

as source of political power the 'one will', and makes it the representative of society.[3]

We thus come to the second feature that distinguishes the Hobbesian modern State from the *civitas* of the 'Ancients'. The assertion of the autonomy and the supremacy of politics over society is accompanied by a hypostatisation of the latter in a mythical (Leviathan, but also the State) and anthropomorphized figure.[4] The State is, in short, formed in the image and likeness of the individual: "And he that carryeth this Person, is called SOVERAIGNE, and said to have Soveraigne Power; and every one besides, his SUBJECT."[5] In this sense, and perhaps only in this sense, is it possible to speak of individualism in reference to Hobbes's theory of the State. After all, this person is self-sufficient and annuls the flesh-and-blood individuals active in the society.[6] Yet Hobbes (and his democratic counterpart Rousseau) still keeps a weak linkage between politics and society through the theory of the social contract. Though Hobbes asserts the irrevocability of the mandate conferred on the sovereign, he considers that in the presence of particular acts of power this mandate automatically falls. The social contract is accordingly still operative; it is not just an ideological fiction for purposes of legitimizing authority, but represents a genuine source of production of law, and the effective foundation of political representation.

Thus, Hobbes fails to take the next step, i.e., making political power fully autonomous by setting it in an abstract space. This will be only undertaken by Kant. According to Norberto Bobbio, the abandonment of the state of nature and the creation of civil society in Kant's theory of law represents something more for the individual than a Hobbesian or Lockean utilitarian calculus. It is even conceived of as a moral duty in the sense that once constituted, the sovereign's power no longer has limits[7]. Kant's conception of the social contract as a logico-trascendental prerequisite for the system of positive norms provides the basis for the modern state with the idea that these norms are valid and legitimate on the condition that they can be traced back procedurally to the very hypothetical contract. The function of

---

Michelangelo Bovero: *Società e stato nella filosofia politica moderna* (Milano: Il Saggiatore 1979), in particular pp. 40 ff.

[3] See Thomas Hobbes: *Leviathan*, ed. by Crawford B. Macpherson (Harmondsworth: Penguin 1986), pp. 227–228.

[4] Hans Kelsen grasps well the ideological and instrumental nature of this anthromorphic personification of which the State is the highest expression. This idea still survives today in the figure of the legal person and is based on the assumption of the 'naturality' of that entity called 'State': "Die Naturmacht ist in Wahrheit das anthropomorfisch verkleidete, in üblicher Weise hypostasierte politische Postulat: daß alles gestattet, bzw. geboten sei, was den Interessen gewisser Träger der öffentlichen Gewalt entspricht" (*Der soziologische und juristische Staatsbegriff*, 2nd edition (Tübingen: Mohr 1928), p. 137).

[5] Thomas Hobbes, *supra*, fn 3, p. 228.

[6] The frontispiece of the first edition of *Leviathan*, it will be recalled, shows a graphic image of this mythical subject, its giant limbs made of the bodies of the subjects.

[7] Cf. Norberto Bobbio: *Giusnaturalismo e positivismo giuridico* (Milano: Comunità 1965), p. 166.

this contract is not to supply a material parameter into which the norms have to fit in order to obtain legitimacy, but in enabling the legislator's norms to be conceived of as emanating in accordance with the general will, thereby attributing *a priori* legitimacy to positive norms. While in Hobbes the social contract is *the* source of *the* production of law, Kant's argument will imply that the social contract provides the law with a higher source of justification *but* without reference to extralegal criteria. A hypothetical original contract is postulated, but the only thing it prescribes is respect for the form of the law. With Kant, then, we seem to have the affirmation of what Niklas Luhmann has called 'legitimation through procedures' and Max Weber 'legitimacy of a rational type'. The law and the State (the political order) thus found each other.

The development of the relationships between law and politics are summarised by Norberto Bobbio by means of distinguishing three types of natural law doctrines: (i) scholastic, (ii) rationalist, and (iii) Hobbesian. According to the first, natural law supplies the most general principles "from which the human legislator should draw inspiration in formulating the rules of positive law".[8] According to the second (whose representative cited by Bobbio is Kant), natural law supplies the material part (the prescription) of the norm, whereas positive law constitutes the formal, procedural part (the sanction) of that same norm.[9] The third type of natural law doctrine, the Hobbesian one, would offer merely the ideological (legitimating) foundation of the positive legal order. "In this conception, natural law serves only to set the system in motion".[10] While for Kant the material element of the norm is given to us by natural law, it should be added that the German philosopher has a formal conception of the law in question. Natural law does not supply the content of individual legal prescriptions, but their form. This form is thereafter sanctioned by the coercive power of the State. It is not the law's task to establish *what* individuals ought to do in their mutual relations, but *how* they should do it, so as to avoid conflict with each other. The law does not say what I should buy, that is, whether I should buy a horse or a car, but it prescribes how or in what form I must buy it in order for the thing acquired to become 'mine'.[11] In Kant, natural law is understood as an *a priori* form of positive law.[12] This is not a law that has validity in itself and can as such do without the positive law, or even be opposed to it. Natural law in the Kantian sense is a logico-transcendental condition of positive law. Accordingly, Kant's legal conception can be seen as being centred around the positive legal order much more than were the traditional seventeenth- and eighteenth-

[8] *Ibid.*, p. 129.
[9] *Ibid.*, p. 130.
[10] *Ibid.*, p. 131.
[11] *Ibid.*, p. 86.
[12] Immanuel Kant: *Metaphysik der Sitten*, a cura di Karl Vorländer (Hamburg: Meiner 1954), p. 43.

century theories of natural law. His *iusnaturalism* turns into *iusformalism*".[13] We may say that natural law undergoes a radical transformation with Kant. It is reduced to an *a priori* form of positive law, dematerialized (no longer conceived of as a body of substantive principles) and formalized (now being a body of procedural principles to which the positive legal norms must conform regarding their structure and institutionalization). This formalist idea of natural law is expressed in the well-known formula: "The law is the limitation of the freedom of each by the condition that it accord with the freedom of every other, in so far as this is possible in accordance with a universal law".[14] Positive law is, in relation to this a priori idea of law, the instrument through which this idea is imposed on people: "The *public* law is the set of *external* laws that make such a general agreement possible".[15]

Thus, Kant's conception of the State seems, in comparison with Hobbes's, to mark a further step forward in the direction of autonomising political power. Whereas in Hobbes the social contract is something prior to the State and founding its legitimacy from outside, Kant manages to legitimise the State *from within*, without recourse to extra-political, or better extra-formal criteria. For Kant this is by no means a fact, but a mere idea of reason. The novelty characterising the Kantian approach as opposed to the previous natural-law tradition is not so much the denial of the historical validity of the theory of the original contract (i.e. denying that such a contract ever historically existed), as its characterisation of the contract as a source of legitimation in anti-substantialist terms, in accordance with the formulation he gives the ethical problem. Ethical formalism in Kant is, then, consistently translated into legal formalism. Just as the ethical foundation of action does not lie in its object but in the form of the maxim that requires it (in order to be universalisable), so, similarly, the legal foundation of the law does not lie in some pre-existing prescriptive natural law that determines the ends and contents of the law in question, but in the form of that law (so as to exclude *privileges* and presuppose the equality before it of all citizens, i.e. for the law to be general and universal). The law as "expression of the general will, can be only one thing and concerns the form of the just, not the matter or object

[13] Norberto Bobbio, *supra*, fn 7, pp. 164–165: "Kant, like the iusnaturalists, distinguishes the state of nature governed by natural laws from the civil state governed by the positive law. But in giving an account of the diversity of the two states in relation to the nature of the law in force in each, he says that the first is a provisional state, and the second a peremptory one. In some passages, however, assuming the idea that this peremptoriness is the essential feature of law, he talks of the state of nature as of a non-legal state, counterposing to it as the only possible legal state the civil state. This confirms that in Kant's thought natural law is a law inferior to positive law to the point of becoming a non-law when set up in antithesis to the law in the strict sense".

[14] Immanuel Kant: *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, in *Schriften zur Geschichtsphilosophie*, ed. by Manfred Riedel (Stuttgart: Reclam 1980), p. 136.

[15] *Ibid*.

to which one has a right".[16] And the form of the just is, for Kant, given by the generality of the law and the corresponding concept of equality before the law. When he speaks of the 'civil state' as a legal state, he identifies three principles on which this state is founded: (i) the liberty of the members of society as human beings; (ii) their equality as subjects; and (iii) their independence as citizens. The central principle of these three, the one that attributes juridicity to the civil state, is, however, the concept of equality, which is defined as follows: "External (or legal) equality in a State consists in the relation between citizens such that none can legitimately oblige another to anything without at the same time subjecting himself to the law whereby he *can* in turn be obliged by the other in the same way."[17]

We can summarize Kant's thought on the theme of the social contract on the basis of two fundamental passages: (a) a first slip of meaning between the social contract and the *a priori* idea of law; the first is converted into the second, or becomes a part of it; (b) a second slip in meaning between the *a priori* idea of law and the formal juridical law as a general, abstract provision, through the mediation of an idea of law that coincides with the notion of legal equality. Kant hereby marks obvious progress in the process of autonomisation of the political institution, which for Hobbes still found its source in legitimation through mandate (albeit remote in time and not revocable) of the citizens. In Kant this source of legitimation, thanks to the sequence social contract/*a priori* idea of law/formal law, comes to be identified with the political law itself. In other words, while for Hobbes the social contract presupposes a situation of disagreement and acute moral conflict to which the contract puts an end, for Kant the social contract is, on the one hand, produced by a previous situation of normative agreement (through the *a priori* idea), and, on the other hand, gives rise to situations of conflict because it establishes an objective interest against which the various subjective interests may diverge.

The departure from the natural law tradition is of major importance. While contractualist natural law doctrines still see the original contract as a mandate and the rulers as mandatees more or less dependent on their mandators, the Kantian social contract is a normative reference point to test the imputability of the law to its addressees. On this view, these two properties tend to coincide. Accordingly, even given that the sovereign's actions are manifestly contrary to the subjects' desires, one cannot, for Kant, speak of a breach of the original contract, at least as long as it seems possible formally to attribute these actions to the general will of the citizens. Still less can one appeal to an alleged right of resistance. In short, the only legitimate power is one that moves within the limits of the norm it has given *to itself*,

[16] Immanuel Kant: *Zum ewigen Frieden*, ed. by Theodor Valentiner (Stuttgart: Reclam 1983), p. 139.
[17] *Ibid*., p. 25.

and not within the limits of a norm that *others* or *another* (as postulated by ancient or modern jusnaturalism) has given it.

This can have at least two interpretations. On the one hand, one may take a narrowly legal positivist, statist reading, ending in reducing the idea of the social contract to an ideological support for an authority that legitimizes itself. On the other hand, however, there is the reaffirmation of the centrality of the citizenry as the source of legitimacy for the political system. Obedience to the law is justified if and only if it is possible to impute that law, even if only formally, to those who have to observe it. But to be able to do so, the 'subject' must in principle also be a citizen. In the absence of other forms of legitimating norms, citizenship becomes a keystone of the political edifice and its importance is reflected in how its articulation becomes a proviso for defining the quality of the political system itself. In order to judge that – in accordance with an old Aristotelian idea proposed at the start of the Third Book of the *Politics* – it is at the rights of citizenship that we have to look.

II. The Troubled Relationship Between Law and Politics

The emergence of politics as an autonomous field gives rise to a major question, namely that of the relationship between law and politics.[18] As we will see, the concrete way in which the autonomy of politics emerged did not only give rise to the problem, but also heavily influenced the way in which the two fields are distinguished (or collapsed). In this section, I will distinguish between those legal theories affirming a connection between law and politics ('voluntaristic') and those denying such connection ('separationist'). I will then consider the implications that the connection or separation of law and politics has for the status and role of fundamental rights.

A) Voluntaristic Legal Theories

Defenders of the thesis that there is a connection between law and politics see in general the former as an appendix to or instrument of the latter, an "offspring of politics".[19] This view is typical of classical legal positivism and other 'voluntaristic' legal theories; in a more complex way, it is also Kelsen's. For the 'classical' legal positivist the law is the outcome of the homogeneous sovereign will, the command of the 'political superior', in the

[18] For a recent survey of this issue, cf. Martin Loughlin: *Sword and Scales. An Examination of the Relationship Between Law and Politics* (Oxford: Hart 2000).
[19] See, for instance, Jeremy Waldron: *Law and Disagreement* (Oxford: Oxford University Press 1999).

words of John Austin, the father of 'analytical jurisprudence' in the English-speaking world. Whereas the law only enjoys limited autonomy, politics is understood as the total activity of the sovereign as such, and thus covers a much wider range of types of command. For a cruder version of voluntarism, any sovereign will can be transformed into a legal norm. Consider, for instance, Soviet theories of law, especially Vyshinsky's, or else certain Germanic theories of the monarchical principle. In both, the law is a form of dominion, of *Herrschaft*, of supremacy of certain subjects over others, so that whatever formalism accompanies the law should be thought of not as a limit on supremacy but as a vehicle for it, a rationalisation that distributes and enhances its incidence and efficacy on the social territory.[20]

A different, more complex case is Hans Kelsen's. In Marx's legal thinking he criticised not so much the voluntarism, as the other main tenet of the theory, that is, the idea that law can and must wither away, albeit in a remote stage of social evolution. For Kelsen, law has a twofold life: it is norm, form, procedure; but also sanction, coercion, violence, even though the *Grundnorm*[21] may also have the task of overcoming this tension and making us forget it. The law is thus tragically strained between normativity and facticity, and without the facticity (which it derives from politics understood, *inter alia*, as the monopoly of force), there is also no normativity left. For Kelsen, indeed, normativity starts to operate only in the presence of actual facticity. Nonetheless, in this view law and politics remain two areas that are tendentially distinct and separate: the former all norm, the latter all fact.

In institutionalist theories, particularly the 'classical' ones of which Santi Romano's thought is an excellent synthesis, the ambiguity remains. Even if the link to the norm or the structuring of legal material by-norms is not always rejected, the institution is conceived pre-eminently as a political fact, i.e., as the dynamic of the social forces that take on the leadership of the community. This outcome of 'classical' institutionalist doctrine is extremely clear in the doctrine of the 'material constitution', that is a direct descendent of Italian institutionalism. For Costantino Mortati the law is pre-eminently 'constitution', and 'material' (non-formal) constitution.[22] This 'material constitution', even if it is structure, system, organization, and not just community or organism (and hence does not go as far as to embrace decisionism or reaching the extreme of voluntarist subjectivism), is nonetheless also the organization of the ruling political group. Behind the notion of 'material constitution' lies the exaltation of the political party as the driving centre of legal and communal life. The institution and the norm thus refer to activities of a decidedly political nature. Law is constructed through

[20] Marx is not far from this formulation, nor are some of his contemporary epigones, like the exponents of *Critical Legal Studies*, for whom the formalism characteristic of law is not much more than an expedient for political and social domination.
[21] The basic or founding norm (N. of the E.).
[22] See his *La costituzione in senso materiale* (Milano: Giuffrè 1940).

the centrality of politics in determining the governing structure of society. The liberal neutrality of law might perhaps be reproduced in such a scheme only at the level of doctrine or legal science, were it not for the fact that the norm, being no longer a formal rule but more an ideological standard or principle, lends itself ill to detached reproduction, and instead impels conceptualisation of it that also, and necessarily, has to be clarification, concretization, specification.

In a paradoxical way, traditional natural law theories do not maintain much of a distance and separation between the two spheres. Some natural lawyers think that way when they introduce the incommensurability of fundamental values or goods, or else adopt a notion of common good that does not need or refer to any deliberative, intersubjective articulation. Ultimately, *auctoritas non veritas facit legem*, and the law cannot in turn make or structure authority. Obviously, in order to do this ultimate task, the authority must be a, so to speak, 'simple' or 'atomic' entity, that is, not itself subject to disagreement. There must be the 'One person' or the 'One Body' evoked respectively by Hobbes and Locke. Otherwise, how could disagreement be overcome? On what concerns the incommensurability of fundamental values or goods, and in the absence of cognitive criteria of measure and 'weight', one has to fill the gap in an authoritative fashion. In the case of the non-reflexive common good, it may be held that the important thing is to measure the common good, or in some way to realise it, without having to enter into long, hard discussions about the content of the common good itself, or the adequacy of the means that may be adopted to that end. Thus, for instance, for a natural law theorist like John Finnis, who assumes the 'perhaps scandalously stark' principle that authority is justified by the mere fact of existing *de facto* and hence by its possibility to impose itself and consequently to provide for the common good.[23] For this sort of iusnaturalism the law ends essentially by collapsing into politics, saving only certain requirements of reasonableness and moderation and a certain fidelity to suprapositive values of an essentially religious nature. This is obviously a particularly stark conception of 'politics': namely, politics understood as collective deliberation as to the rules to adopt in order to guarantee the coordination of conduct. This is, on this view, collapsed into the situation of *fait accompli* and the gesture of command. A somewhat disquieting consequence of such an attitude is that all forms of authority or government are said to be in principle equivalent. The adoption of the one instead of the other will depend not on normative assumptions and reasons but on contextual, instrumental and prudential considerations: "The ruler may be

[23] See John Finnis: *Natural Law and Natural Rights* (Oxford: Clarendon 1980), p. 250: "The sheer fact that virtually everyone will acquiesce in somebody's say-so is the presumptively necessary and defeasibly sufficent condition for the normative judgment that that person has (i. e. is justified in exercising) authority in that community."

one, or few, or many ('the multitude', 'the masses'). There are social circumstances when the rule of one will be best, and other circumstances where the rule of a very narrow, or a very wide, class will be best."[24]

B) Separationist Legal Theories

A quite different view is taken by those who radically deny any voluntarist nature to law. Among these, Friedrich August von Hayek is one figure of particular interest to us. To this Austrian economist, law is first and foremost a set of conduct norms of just conduct, while politics is pre-eminently made up of organizational rules (equivalent to rules of organization *of government*). The law is a spontaneous and involuntary phenomenon, while politics is artificial and voluntary: it is 'constructivist' and more persuasive than modern science. Whereas the law exists in the deep structure of society and tells us 'what is'; politics prescribes 'what ought to be'. The law is general and abstract and seems to clash with its alleged intrinsically evolutionary and historical nature; politics has a definite purpose, it is particular and concrete. The law is based on relations of reciprocity, politics on relations of command. The law proposes to *stop things being done*; politics wants to *get things done*. The task of the man of law is essentially cognitive;[25] the task of the politician - the 'head of an organization' – is directive. The law is essentially *private* law; for public law is in fact either politics or else, as in the case of constitutional law, a superstructure created in order to ensure the real law, namely private law. Accordingly "a constitution is essentially a superstructure erected over a pre-existing system of law, to organize the enforcement of that law".[26]

C) Towards a Deliberative Conception of the Relations Between Law and Politics?

I shall take advantage of the conceptions spelt out in the previous sections to bring out what in my view is the difference between law and politics. Despite all differences, both conceptions agree on that point. This is the playing down, or more simply the negation, of the *deliberative* element of law. For Hobbes and the positivist tradition, the will that produces the law is indeed will, and absolute will; but it is neither reasoned, nor weighed. The Hobbesian will is the fruit of aggregation or mechanical calculation of

[24] *Ibid.*, p. 252. This reminds us of a similarly bold statement by Jacob Friedrich Fries, not in the least an Aristotelian or Thomist philosopher: "Vor Recht ist es gleich, wer der Regent sey, ob einer oder hunderte, genug, wenn durch ihn das Gesetz gilt" (Philosophische Rechtslehre (1803), now in Id., *Sämtliche Schriften*, edited by Gert König and Lutz Geldsetzer, vol. 9 (Aalen: Scientia Verlag 1971), p. 105).

[25] See Friedrich Von Hayek: *Law, Legislation and Liberty,* Vol. 1, *Rules and Order* (Chicago: The University of Chicago Press 1998), pp. 119–120.

[26] *Ibid.,* p. 134.

preferences. Similarly, in the case of some natural lawyers' objectivistic, intuitionistic iusnaturalism, given the incommensurability of values or fundamental goods, it will not be possible to speak of or tend towards a 'one right answer' for a case or practical problem. The *factum* of the *decision* – not its propositional content – is then, as such, the one right answer, and is so as being separated from 'a reason', since no such reason can be found. This model reproduces *mutatis mutandis* the Hobbesian sovereign will that justifies itself just because there is no possible agreement among individual subjects as to the values and goods to be pursued collectively. On this view, then, it is ultimately indifferent what value triumphs, as long as one does. All deliberation is therefore useless being a mere psychological mechanism to prepare the will. But it cannot have any justificatory propositional value. Paradoxically, the same happens in Hayek's perspective. The law is involuntary. It lies in the deep structure of society which the subjects do not control, but by which the subjects are moved. Constitutional law is in the best of cases a superstructure, and deliberation on legal norms, when not useless or harmful, is only a sort of fiction, performing at best a purely motivational function. What in the end repels Hayek, like the Hobbesian positivist or the objectivist natural lawyer, is arguing over the law, and *deciding together* using reasons that may be subject to revision.

At this point, we can draw three conclusions. Even if rather banal, they have enormous consequences. First, the concept of law is *controversial*. Law is first and foremost about *disagreement* and controversy.[27] Second, the concept of law, being controversial, and moreover being a 'social' concept, calls for *public discussion*. The concept of law thus refers to the public discussion of the society that is to adopt it, and by adopting it constitutes it as its own social reality and institutional fact. Third, controversy and public discussion over law can be defined as the sphere proper of *politics*.

In my view, law is not simply an overcoming of disagreement; it is both an effect and a cause of disagreement, since its rules are meant to aim at substantial coordination of conducts but are not immune themselves to disagreement about their meaning and scope. Moral disagreement is also not trumped by legislation. If that was the case, the sovereignty of the lawmaker should be considered to be 'safe' from disagreement. However, this cannot be avoided even within sovereign acts, not to speak of their implementation and assessment. Even if we are driven by the logic of the argument (i.e., that legislation is the solution to moral disagreement) to some version of the Rule of the One, one cannot accept a strong decisionist view of the phenomenology of political decision because it is difficult to circumvent the question of practical reasoning. This springs from potential normative perplexity, in any kind of individual deliberation. Since one can disagree with oneself, moral disagreement is not excluded by shifting the deliberative

[27] Cf. Jeremy Waldron, *supra*, fn 19.

moment from a collective to an individual perspective. Otherwise critical morality would in any case be a matter of course- which is not the case. Morality presents itself in the form of a fork of road, of a crossroads, of an alternative, a choice in which a solution is often incompatible with other options[28] – in the form, we might conclude, of a disagreement. But morality cannot easily be turned off in the context of practical reasoning: exclusionary reasons are operative against it only *prima facie*. Strategic reasoning can be translated into moral arguments; for instance, we can ask whether the ends we are aiming at are really valuable and worthy of being pursued.

At this point we may perhaps find aid in the thought of Michael Oakeshott. In one of his best-known, most influential essays, *On Civil Condition*, the British scholar takes as his theme just this relationship between law and politics. The former, which in Oakeshott's lexicon takes the name of *lex*, sets the fundamental conditions, among them those "of a durable and diurnal association *inter homines*, as indispensable as may be, where the terms of relationship are exclusively the rules of a practice which may concern any and every transaction between agents and is indifferent to the outcome of any such transaction".[29] The law thus lays down the primary conditions for the "practice of being 'just' to each other".[30] The legal norms "are not commands to obey, but conditions to take into consideration and subscribe to in choosing courses of action".[31] Politics for Oakeshott is instead treated partly as "ruling" – "governance", we might say – "understood as the authority to require (what lex itself is incapable of demanding) the performance of substantive actions by identified persons".[32] But politics understood as the discussion and controversy that precedes the issuing of the rules cannot, however, be brought under this notion of 'ruling', which is something more of the nature of an executive aspect of rules already laid down and hence posterior to the issuing of the rules themselves.

One might escape this notion of politics by holding that the norms are not laid down but are *given*. Yet Oakeshott himself, who inclines towards a traditionalist conception of society, admits that 'lex' (the law) is essentially amendable. Amendability is one of the characteristic features of 'lex'.[33] When Oakeshott defines citizenship, it would seem that the job of *civis* ought to be limited to *recording* an institutional situation one finds oneself, so to speak, existentially thrown into or immersed in, and from which one cannot escape or rise. The idea of citizen is that of an associate "in terms of a practice or language of civil intercourse *which they have not designed or*

[28] Cf. R. De Stefano: *Per un'etica sociale della cultura*, vol. 2, *La cultura e l'uomo* (Milano: Giuffrè 1963), chapter three.
[29] Michael Oakeshott: *On Civil Condition* (Oxford: Clarendon 1975), p. 128.
[30] *Ibid*.
[31] *Ibid.*, p. 182.
[32] *Ibid.*, p. 143.
[33] *Ibid*., p. 139.

chosen but within the jurisdiction of which they recognize themselves to fall".[34] Nonetheless, Oakeshott recognizes that the citizens subscribing to the practice or situation they find themselves in without having planned or desired it are able continually to re-explore and reconstruct it.[35] The *civitas* is an artificial, not a natural organism – and this is the fundamental difference from Hayek. Politics exists not just in the form of 'ruling', applying the fundamental laws of the *res publica*, but also in terms of what he explicitly calls 'politics'.[36] This is defined as the commitment to reconsider the desirability of the conditions of the political association and the practice corresponding to it and underlying it. Politics is not, then, action for the satisfaction of needs. The objective of politics is, according to Oakeshott, the conditions of the *res publica*, brought into discussion, however, not in relation to their legitimacy or authority, but only their desirability. For this British scholar, politics is a sort of pressure by private persons on the legislator, the normative justification of whom is not, however, called in question. Politics is, then, a way of thinking about the norms to which one gives authoritative assent, but which does not merge with nor can be identified with their content (since it, politics, specifically calls in question the desirability of those contents). "Political engagement, then, is an exploration of respublica in terms of the desirability of the conditions it presents, and this entails a relationship to respublica which is at once acquiescent and critical. The ingredient of acquiescence is assent to its authority".[37]

This description of politics would be persuasive had it not been for the fact that it limits the scope of political discussion. Oakeshott wants above all to rule out any reflexion on or consideration of the nature and extent of the authority of the laws, and then push into a non-political dimension any utopian demand and any reference to radical change.[38] This is, however, hardly plausible if one considers the fact that, if *lex* is amendable, then also the content of this communal life and hence its binding force (and authority) might be the object of reforms and amendments, and even of abrogations. The object and binding force of the norm (*lex*) are separate objects only for ~~a~~ hard-core legal formalism. If we accept the Razian notion of authority where a second-order reason favours the realisation and operativeness of the first-order reason, it cannot be seen how the bindingness and the content of the norm can be sharply separated.[39]

---

[34] *Ibid*., p. 183. My emphasis.
[35] See *ibid*.
[36] *Ibid*., p. 161.
[37] *Ibid.*, pp. 163–164.
[38] Indeed this is quite close to Eric Voegelin's attempt to equate 'gnosis' with social reform: see Eric Voegelin: *The New Science of Politics* (Chicago: The University of Chicago Press 1952), chapter 4.
[39] Cf. Massimo La Torre and Gianfrancesco Zanetti: *Seminari di filosofia del diritto* (Mannelli: Rubbettino Soveria 2000), chapter 2.

Legal praxis shows that it is hard to distinguish clearly between the content of the norm and its authority. The citizen does not only discuss the concrete terms of the citizenship contract, but also whether it is worthwhile stipulating or perhaps terminating such a contract. Again, to be able to treat the terms of such a contract in an evaluative mode, one has to be able to assume, albeit counterfactually or hypothetically, a condition where the contract in question would not apply. If we consider the fact – consolidated in contemporary democratic States – that the force of a norm (for instance, its constitutional coverage) depends not just on procedural questions or correct derivations of competence, but also and above all on the fact that the content of the given norm conforms with certain values or principles, or performs certain functions within the legal system.

Consequently, the limit set by Oakeshott on 'politics' (stopping before discussion of the binding force of legal norms) cannot stand up to critical evaluation neither from a normative nor from a phenomenological viewpoint. Otherwise, however, his proposal can be retained: politics is indeed "engagement to deliberate on the conditions laid down in respublica".[40] If we accept that, important consequences follow.

D) Implications

The first consequence is that between law as controversy and discussion, on the one hand, and politics as the collective and social venue for controversy and discussion, on the other, there is a connection that in some respects is conceptual. From this derives another consequence: that between law and rights there is not necessarily conflict. This needs further explanation.

We know how hostile traditional legal positivism was to the notion of subjective rights, and the still stronger one of fundamental rights.[41] A subjective right (essentially, a freedom) is not congruent with a vision of the law (as objective) as constraint or coercion, like the one in general defended by legal positivism. On the other hand, the fundamental right which constitutes an inviolable limit on the legislator's sovereignty, is ill-suited to coexist with the romantic theory of the latter's omnipotence. This theory is also common to certain democratic conceptions that identify the general will with the expression of a homogeneous collective body (typically the state in positivistic public law doctrine).[42] The 'general will' is compressed and materialised into 'one will'[43] and the assertion is therefore that democracy

[40] Oakeshott: *supra*, fn 32, p. 163.
[41] Allow me to refer in this connection to Massimo La Torre: *Disavventure del diritto soggettivo*, (Milano: Giuffrè 1996).
[42] Cf. Giuseppe Volpe: *Il costituzionalismo del Novecento* (Roma-Bari: Laterza 2000), p. 11, where the formation of the modern State is thus encapsulated: "The State became the Only One Being."
[43] Thus following an obsession for the rule of One which runs through the entire Modern history of political and legal thought. "No es imperio el que no se reduce a uno", says for instance a

tolerates no limits to the manifestation of the popular will. On this view, the general law, being the mere expression of the majority at a particular moment (and hence being eminently contingent, an expression of *Jeweiligkeit*, as stressed by Carl Schmitt, a staunch advocate of a radically majoritarian view)[44] can in some sense be overthrown or altered by the same majority. The constitution could, then, never constrain the people's will into a corset of principles and fundamental rights since their nature and dignity remain that of the constituent power, that is, a power that is supreme and previous to the constitution. It is only in politics that legitimacy resides; norms, laws, constitutions and rights are only forms of legality. The consequence is that the cold *ratio* of legality can, in a democratic system, always be overthrown by the *voluntas* of politics.

It is possible to maintain this just because *ratio* and *voluntas* are separated and a non-cognitivistic, expressionistic conception of political decision is defended, but it does not derive from deliberation. Disagreement, controversy and conflict, springing from incommensurable interests and values, by preferences already given and formed or else by subjective interpretations phenomenologically incapable of meeting, do not allow confrontation and discussion. Any discussion either already presumes agreement (as the result of some sort of *auctoritas*, not *veritas*) or else basic homogeneity (essentially of an existential type), or else is a mere loss of time: *dum Romae loquitur Saguntum espugnatur*.

The problem, however, is that the will is never homogeneous, neither at the collective nor at the individual level. Preferences, even at the individual level, are not given once and for all, and in any case crystallize around reasons with a propositional content enabling them to be dealt with logically and argumentatively. If this is true at individual level, it is *a fortiori* so at collective level. There can be no collective will without the formation of common propositions around common reasons, which again is the outcome of the weighting and the confrontation of diverse, plural, *individual* reasons. A 'general will' can never really be 'one will'. Communality of reasons and propositions cannot significantly exist without some sort of *discourse*. If there is discourse, there will also be weighing of and deliberation on arguments in a not entirely unreflexive manner.

If politics is controversy, discussion and deliberation on the community's legal norms, then it may plausibly be held that this controversy, discussion and deliberation – referring, as they do, to certain discursive constitutive conditions – are not entirely instrumentalisable. They cannot be left totally to the will of the participants. A discussion requires mutual

---

Baroque writer such as Saavedra Fajardo in his *Empresas políticas* (Empresa LXXX). The text can be found in the edition by Ediciones Cátedra, Madrid, 1999.

[44] See Carl Schmitt: *Legalität und Legitimität*, 6th edition (Berlin: Duncker & Humblot 1998), p. 61.

recognition among subjects and a set of procedural rules. Applied to a theory of democracy, it becomes fairly clear that this, if it proceeds by discussion and deliberation, has to have foundations not liable to be overthrown by the mere will of one or more participants. If democracy is deliberative, it has not just a volitional, but also a certain cognitive character. This is obviously not at the disposal of the mere will of the subjects. But it is not only the substantive content that can have cognitive character; so can also procedures and contents associated with procedures. Some types of status, for instance, around which procedures turn, take on value because of the amount of justification and knowledge that these procedures are able to produce. Fundamental rights acquire such a dignity once democracy is associated with a conception of politics in the terms defined by Oakeshott as "engagement to deliberate on the conditions prescribed in respublica".

Having said that, we can go on to draw further conclusions, this time as to the relationship between *rights* (not law) and politics. We may say that if the law follows politics as deliberation, rights (as fundamental rights) precede it. For they appear as constitutive conditions (procedural statuses) of political deliberation. Fundamental rights, however, on the view I am seeking to develop here, do not serve so much to limit the scope of politics, as to constitute it, or to give it form. The point is not, as liberals do, to conceive of a space for politics that always tends to be egocentric and authoritarian, and then pull out of the magic hat of the written constitution a handful of rights in order to tame or embellish it. Rather, fundamental rights have constitutive value for the political space itself. They must, accordingly, not just, so to speak, define the arena and the rules, but also the game itself. Rights are here not just 'rules of obligation' à la Hart, or 'rules of just conduct' à la Hayek, but also 'rules of power' (in Hart's terminology) or 'rules of organization' (in Hayek's lexicon). This means that the controversy and the deliberation that make up politics must exist as activities through which the rights are rendered operational and their mutual recognition reproduced and clarified. Fundamental rights will thus apply not just in relationships between public authorities (the State) and citizens (individuals), but also in relationships between individuals, and even within the structure of the State. Within the precinct of the *respublica*, there cannot in principle be any space opaque to rights and impenetrable by them.

Moreover, given the endurance of reasonable disagreement much beyond the threshold of legislation[45], rights are important tools for a correct implementation of the general will. As a matter of fact, a "bill of rights provides constraints within which judges operate, and thus it reduces the

[45] For the simple fact that laws and statutes and rules in general do not rule their own application and are in need of interpretation, and interpretation is not a piece of calculus but is inevitably open-ended and based on justification.

intensity of the legitimacy gap that raises every single case that they give judgments not mechanically based on positive law".[46]

However, in order not to take away the meaning and relevance of public deliberation, it has to be held that fundamental rights cannot prejudice the outcome of deliberation. They cannot, accordingly, be too 'dense' or loaded with cultural or ethical content. For instance, the content of the political identity of the respublica cannot be given prior to the constitution of fundamental rights, since these play an eminently procedural part. This identity must rather be the outcome of an extensive, ongoing public debate: *un débat de tous les jours*, paraphrasing Renan. Fundamental rights cannot in their configuration replace this or stand in for it – on this point the concerns of Waldron and others seem to me to be justified. Accordingly, any reference to specific ethnic, linguistic or religious traditions, or 'comprehensive doctrines' (to use Rawls's most recent lexicon), must be carefully avoided.

Finally, my last consideration concerns the finding that there is a compatibility and congruence between fundamental rights and democratic politics. This does not permit romantic exaltations of the general will, or disenchanted hints at the need for a binding decision by a legislator. The discussion of Kant's legal-philosophical positions in this connection led us to similar conclusions. Even when a 'strict' legal positivist interpretation of Kant's political philosophy was possible, (and thus continuing the work of Machiavelli and Hobbes), the centrality the German philosopher allots to citizenship, rules out the possibility for his position to end up as an exalted romantic version of the sovereign will, or a sceptic theory which conceives it as the only possible reason for civil co-existence. Citizenship, as the possibility for the subject to become the author of the positive laws he must then obey, is the condition that makes normatively acceptable the move from a pre-legal state to a state of positive law.

But citizenship for Kant is the political translation of the situation of the subject's moral autonomy. Citizenship reproduces moral autonomy by simulating it at an institutional level. This means that the general will finds its moral root in the autonomy of the individual, who, by moving from the pre-legal to the legal situation, is transformed and institutionalised, but not denied. The institutional transformation introduces coercion and sanction as facts specific to the legal situation, which however, in order not to become an immoral situation, has to simulate or else reproduce some sort of validity of moral autonomy. This is made possible by linking the sanction to the general will and referring the latter to certain fundamental legal rights of the subjects. Without fundamental rights, the citizens, once the law was given, would simply be subjects, non-moral entities. Being a subject can be justified only as long as one is also a citizen, and specifically by the fact that this (being a citizen) means being able to remain a person, a moral entity. But the only

[46] See chapter 2 of this volume.

way of securing this, of setting up such a virtuous circle, is to create a subjective legal situation similar to the situation enjoyed by the moral subject (that is, like the pre-legal situation). We have supplied this situation or mechanism with fundamental rights which is then the outcome of the *a priori* idea of law. Thus, For Kant the idea of law or the concept of law is not the product of legislative activity, but of mutual recognition of freedoms and rights. Fundamental rights thus work a sort of 'miracle': even if it is politics that produces the law (legislation, the positive legal norms), it is however itself also a product of law (that is, of fundamental rights that counterfactually pre-exist the legislative activity itself). They co-originate both a positive and a negative freedom, both public and private autonomy.[47]

III. Conclusion

After this long excursus through philosophies and theories, we can finally, so to speak, put our feet on the ground. It is the legal and political significance of fundamental rights that is the practical problem we are concerned with. Through the discussion in the two foregoing sections we have managed to reach some important conclusions as to the relation between (democratic) politics and fundamental rights. The need now is to apply this legal-philosophical discussion to the reality of a specific institutional situation.

A first finding is that fundamental rights and a legal document enshrining them are not in the least incongruent with a lively and strong democratic regime. Fundamental rights do not impinge on the dignity of (democratic) legislation and cannot be considered as a devise of ever producing or strenghtening a democratic deficit.

The Charter of Fundamental Rights of the European Union was, as we know, proclaimed immediately before the troubled European Council in Nice last December. But what is it really about? We find ourselves facing, as has been well said,[48] something that is (i) a public document, (ii) ascribes or proclaims rights regarded as prevailing over any other subjective legal position, (iii) in the framework of a political and legal structure, namely the European Union's. All this, however, is still fairly vague. Above all, it is not clear what sort of legal value the Charter has. The Nice Council decided that it was not to be formally considered as part of binding Community law. It might then be a "solemn political declaration".[49] But what is a 'solemn

[47] For an impressive and path-breaking 'deduction' of such co-originality, see Jürgen Habermas: *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp 1992), chapter 3.

[48] See Antonino Spadaro: *La carta europea dei diritti fra identità e diversità e fra tradizione e secolarizzazione* (forthcoming, 2003).

[49] Following the Commission's argument. See Communication of the Commission on the legal nature of the Charter of Fundamental Rights of the European Union', COM(2000) 644 final, 11 October 2000. Available at http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000_0644en01.pdf.

political declaration'? The fact that the preamble to the Charter affirms that its chief function is to make more visible the fundamental rights that result from the values of human dignity, freedom, equality and solidarity and from the principles of democracy and the rule of law would seem to assign the document pre-constitutional value,[50] just as the *Declaration of the Rights of Man and Citizen* in France in 1789 preceded and prepared the subsequent Constitution of 1791. However, we should not expect that the Charter triggers off a romantic constitutional moment. As has been rightly remarked, "the Charter is a reminder that the 'constitutional moment' has given way to the less romantic and seemingly more mundane prospect of an ongoing process of learning, mutual adaptation and mutually reinforcing norm development".[51] Despite the coldness or prudence of the European Council in Nice, the binding force of the Charter might nonetheless be asserted through the case law of the European Court of Justice. This is particularly so bearing in mind the fact that the Luxembourg court has repeatedly maintained, specifically in relation to fundamental rights, that it considers itself bound by the constitutional traditions of the Member States. And the preamble to the Charter presents it as a sort of compendium of these traditions. In this way, the content of the Charter might be considered binding indirectly, as a minimum common denominator of the fundamental rights doctrines already in force and operational in the Member States. In addition, in so far as the Charter is a consolidation of the *acquis communautaire* – as stated in the Preamble – the Charter's binding character, at least in those limits (within the precinct of the *acquis*), cannot be seriously challenged. This fact – the Charter being mainly a consolidation of already binding law – dedramatises the disputed question of the Charter's own legitimacy: its legitimacy is the same as that of valid European community law. It may not be a source of law; but it is however at the very least a guide to law.

The 'thinness' of the normative status of the Charter, representing a kind of 'overlapping consensus' of diverse constitutional practices and traditions, does not allow a 'thick' communitarian or culturalist reading of the Charter itself. There is a clear normative preference of individuals over communities. As the Preamble reads, the Union "places the individual at the heart of its activities". This feature is confirmed by the lack of any explicit mentioning of religious traditions in the Preamble, which only refers to European "spiritual and moral heritage". Moreover, this is someting of which

---

[50] Cf. Albrecht Weber: 'Il Futuro della Carta dei Diritti dell'Unione Europea', *Rivista Italiana di Diritto Publico Communitario*, 12 (2002), pp. 31–45.

[51] See John E. Fossum, "The European Charter – Between Deep Diversity and Constitutional Patriotism?", in Eriksen, E.O., Fossum, J.E. and A.J. Menéndez (eds.) *The Chartering of* Europe, ARENA Report 8/2001, p.250. For a view of the 'constitutional moment' as an ongoing and interactive societal process, cf. Massimo La Torre: "Cittadinanza, democrazia europea e 'ideologia italiana'. Per la critica del realismo politico", in Vincenzo Ferrari, Paola Ronfani and Silvia Stabile, *Conflitti e diritti nella società transnazionale*, (Milano: Franco Angeli 2001), pp. 129-84.

the Union is merely 'conscious', not something from which it 'takes inspiration', as it was suggested in a former draft. A previous reference to 'destiny' which could recall the communitarian idea of *Schicksalgemeinschaft* also has disappeared. According to the Preamble, it is not upon cultural, contextual, but upon *universal* values that the Union is explicitly said to be founded. In particular, by strictly linking fundamental rights with a specific comprehensive religious doctrine, the virtuous circle between citizenship and legislation will be put in danger. In fact, if a basic institutional arrangement has to rest on a comprehensive doctrine, it could no longer be considered and constructed as an overlapping consensus[52] deriving both from the fact and the value of modern social and cultural pluralism. On the other hand, a constitutional asset with such a legitimation basis would not allow for the interpreting of the constitution as a full act of self-legislation. A constitution based on a positive religion would be rather a document of self-affirmation or, even better, of self-reassurance of a pre-political non-reflective community against third parties without any pretence of impartiality. Integration processes would then be stopped and switched into exclusionary mechanisms. Moreover, in such a context (religious) minority rights would be seriously reshaped and put back in terms of toleration 'rights'. If fundamental rights are entrenched within a historical comprehensive precinct, those placing themselves beyond such a space could only be given a 'right' to be *tolerated* – which is actually no real right in the full sense, since it lacks the non-discriminatory character of rights as the expression of an intense principle of equal concern. Majority 'rights' – as opposed to minorities toleration – would then be turned into a kind of 'privilege' and the entire dynamic of citizenship would fall apart, since it will miss its background support in a mutual recognition of an equal status among community members.

A last point, which is also stressed in the above-mentioned communication from the Commission, is important for the purposes of our discussion. This is the "principle of indivisibility of rights". It is sanctioned by the concentration of all the rights of the person into a single text and their conceptual and normative linkage. For in the Charter the rights concerned are both the specific ones of the European citizen (a status, we would recall, introduced by the Maastricht Treaty and confirmed and extended by the Amsterdam Treaty) and those of human beings in general, a category covering not just citizens of Member States but also residents in them, and still more generally anyone who happens to be living or staying in the territory of the Member States. Civil, political and social rights are accordingly brought together in the single figure of fundamental rights. The indivisibility of fundamental rights is clearly reflected in the wording of the Charter, especially in its structure. Rights are not presented and displayed

[52] Nor as a modus vivendi, I am afraid.

according to the traditional partition into civil, political and rights one, but rather according to six substantive values, namely dignity (articles 1–5), freedom (articles 6–19), equality (articles 20–26), solidarity (articles 27–38), citizenship (articles 39–46) and justice (articles 47–50).[53] This has two consequences: (a) On the one side fundamental rights – since citizenship rights are reserved to Member State nationals – are pushed up towards the universal category of human rights. If, as the European Commission says, the Charter asserts the principle of indivisibility of rights, it will be increasingly hard to accept that a subject bearing civil and social rights (generic human rights) does not also enjoy political rights (fundamental rights in the strict sense). Unless, of course, one wishes to deny the foreigner (the non-citizen) the totality of social and civil rights, and ultimately any enjoyment whatever of human rights: (b) On the other side – and this is the point that interests us the most here – if the rights are indivisible, there cannot be abstraction of political rights from them in any area. Moreover, since political rights (citizenship, above all), assign positive freedom to individuals, that is, a competence to intervene in the production of positive legal norms, and since these political rights are in principle seen as inseparable from the rights granting negative freedom, then fundamental rights (always, on this view, connected with political rights) can no longer be conceived of as mere limits to the activity of the public authorities. Political rights are first and foremost entitlements to participate in public power. Fundamental rights and political and legislative activity are thus not 'armed against each other', as the romantic or disenchanted defender of the legislator's absolute will would have it. The legislator - on the view developed in the foregoing sections, and on the view, consistent with it, manifested in the interpretation of the Charter itself – is constituted through the exercise of fundamental rights, which are, however, not just political but also civil (freedoms, essentially) and social (rights to specific performance by the authorities). Negative freedom and positive freedom, liberalism and democracy, fundamental rights and public powers, law and politics, finally, thus seem here to find a synthesis and a strong connection, referring reciprocally to each other. This, if taken seriously, cannot fail to have serious repercussions on the European constitutional model itself.

Once fundamental rights are affirmed and the indivisibility of such rights is proclaimed, any project for a *mixed constitution* is devoid of legitimacy.[54] Here I call a 'mixed constitution' one that maintains the idea of various institutional spheres within the Union, of which only one –

[53] See L'Europa dei diritti: in Raffaele Bifulco, Marta Cartabia, and Alfonso Celotto (eds.): *Commento alla Carta dei diritti fondamentali dell'Unione Europea* (Bologna: Il Mulino 2001), pp. 15–16.

[54] See for instance Neil D. MacCormick: *Questioning Sovereignty* (Oxford: Oxford University Press 1999), pp. 147–149, reviving the ancient (Republican?) myth of a mixed form of government pooling together monarchy, oligarchy and democracy.

Parliament (without true legislative powers) – would be the expression of citizenship rights, while in relation to the other spheres only guarantee rights (the civil rights) would apply. In other words, the 'mixed constitution', by some called 'regulatory model',[55] is the one where legislation is distinct from the exercise of citizenship, and the latter ends being reduced to a right sheltering us from the effects of norms, the making of which we do not have a right to participate in. This production is reserved to 'independent' authorities, since it is held that 'deliberation' can come about only away from representative and majority pressures. *Deliberation* and *representation* are thus separated, and entrusted to distinct bodies. The same happens to citizenship and (political) expertise, so that we are confronted with a revived duplication of political rights in passive (the ones of simple citizens) and active (the ones of experts, of a post-modern kind of statesmen). Statesmanship is consequently sharply severed from citizenship.

This latter strategy, which perhaps tends to make a virtue out of necessity by compliantly reflecting a certain picture of today's patterns of the supranational European institutions, is condemned henceforth to clash with the stark reality of the Charter, for which deliberation is not for the few, the experts, the independent agencies, but – albeit tendentially and ideally – for *all*, for the citizens, and for their elected assemblies.

[55] Cf. Giandomenico Majone: *Regulating Europe* (London: Routledge 1996), and Antonio La Spina and Giandomenico Majone: *Lo Stato regolatore* (Bologna: Il Mulino 2000).

Chapter 5

The Canadian Experience of a Charter of Rights

Alan C. Cairns

Editors' Remarks

What are the reasons for why the Charter of Fundamental Rights of the European Union might usefully be compared with the Canadian Charter? Historically speaking, research on the European Union used to be the preserve of international relations and international law scholars. In the 1990s this changed in that more and more scholars from hitherto nationally oriented subfields of political science and legal scholarship entered the fray. This generated new theoretical and methodological approaches and some comparative analyses. However, it seems reasonable to assert that this newfound interest in the EU has spawned few explicit comparisons where the EU or aspects of it are compared with other entities. The general proclivity has also been to compare the EU with the U.S. Canada is far less known than the U.S. but provides a very interesting and relevant case for comparison.

The European Charter was drafted less than twenty years after the Canadian Charter (2000 vs. 1982). The two are thus relatively recent contemporary cases of Charter-induced constitutionalisation. How comparable are the two cases? The Charters differ in their formal status. The legal status of the European Charter is is equivocal, to the extent that it has not been formally incorporated into the primary law of the European Union.[1] The question of its legal status is to be settled before 2004. The Canadian Charter was inserted as a binding text into an already existing constitution. The entities also differ in that the EU is not a state, whereas Canada is.

These differences notwithstanding, there are interesting parallels that warrant a closer comparative examination.[2] For one, it has been argued that the spirit of allegiance that they seek to foster is that of a rights-based *constitutional patriotism*.[3]

Second, whereas the EU is not a state, historically speaking constitutionalism preceded the state, and there are many analysts that claim

---

[1] See foreword and chapter 1 of this volume.

[2] These observations are derived from John E. Fossum: "Charters and Constitution-making – Comparing the Canadian Charter of Rights and Freedoms and the European Charter of Fundamental Rights", ARENA Working Paper 08/2002.

[3] For Canada see Cairns here and John E. Fossum: "Deep Diversity versus Constitutional Patriotism: Taylor, Habermas and the Canadian Constitutional Crisis", *Ethnicities*, 1 (2001), pp. 179–206; for the EU see Fossum, this volume and John E. Fossum: "The European Union – In Search of an Identity", *European Journal of Political Theory*, 2 (2003), forthcoming.

that it does have a *material* constitution, albeit not a formal one. The European Charter, as has been argued in other contributions to this volume, was intended to help further the process of establishing a European Constitution founded on a rights-based mode of allegiance.

Third, as many analysts and also contributors to this book argue, the Charter is *more* than a mere political declaration.[4]

A fourth parallel is that both Charters have been controversial, in that key actors have rejected their status as binding constitutional vehicles. In Canada, the government of Quebec would not sign the Constitution Act 1982. This stance was very much based on opposition to the Canadian Charter. Over time, the support for the Charter has increased so that there is today a great majority in Quebec supporting it. In Europe, the government of the UK was the strongest and most vocal opponent to a binding Charter, and with support from other governments, succeeded in its being presented as a solemn declaration. There is growing evidence in Europe today of a move to make it a directly binding text.

Fifth, both Charters are strongly linked to the emerging international system of rights, as reflected in the UN Charter and the European Convention on Human Rights (ECHR). Several of the contributors to this volume have explored these connections.[5] This international system of rights, as noted below, was also very important to the Canadian Charter.[6]

The sixth and final parallel to be addressed here is that both Charters were attempts at founding each polity on the notion of popular sovereignty. With regard to the EU, prior to Maastricht, at least, its legitimacy was based on performance and was *indirect*. In other words, its democratic legitimacy was derived from the Member States. The European Charter can be construed as one means of equipping the EU with a direct and rights-based mode of legitimation. With regard to the Communities, their legitimacy was exclusively indirect (that is, based on the democratic legitimacy of the Member States) prior to the direct election of the Members of the European Parliament in 1979. But even from then onwards, the democratic legitimacy of the Union stems mainly from the democratic character of the European nation-states. That is so because the decisive role in the law making-process keeps on corresponding to the executives of the member states, either forming as the Council or as the European Council. Under such circumstances, the European Charter can be construed as one means of equipping the EU with a direct and rights-based mode of legitimation[7] With

---

[4] Cf. chapters 2, 3, 8 and 11 in this volume.
[5] Cf. chapter 2 and chapter 3 in this volume.
[6] See also Alan C. Cairns: *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal & Kingston: McGill-Queen's University Press 1992).
[7] For more on these modes of legitimation see John E. Fossum: "Constitution-making in the European Union", in Erik O. Eriksen and John E. Fossum (eds.): *Democracy in the European Union – Integration through Deliberation?* (London: Routledge 2000).

regard to Canada, historically speaking parliamentary supremacy had been sustained by the imperial connection. The patriation of the Constitution and the inclusion of the Charter in the Constitution Act 1982 served to sever this link and could be construed as efforts to entrench the Canadian constitution, in a more explicit sense, in the notion of popular sovereignty. Prior to these acts both Canada and the EU had practiced 'constitutional avoidance strategies'.[8] A critical issue facing both entities is whether they can form a single constitutional *demos* and how necessary this is. Another question is what such a constitutional demos entails in political-legal and cultural terms.

In the following pages, Alan Cairns, provides a set of reasons for why the Canadian Charter was included in the patriated Constitution Act 1982 and an assessment of some of the most important effects of this inclusion. Cairns, in his own writings has to a significant extent set the academic agenda on a number of the items that appear in his chapter. This applies to such terms as the distinction between a *governments' constitution* and a *citizens' constitution*, the notion of *Charter Canadians*, and the relationship between the Charter and federalism.

Introduction

This paper is not written by a lawyer, although the academic legal community plays the leading role in Charter analysis. There are, however, virtues in bringing a political science perspective to the Charter, for the Charter was driven by political purposes. Indeed, discussion of the constitutional protection of rights in Canada has always been conditioned by various extraneous factors. A brief historical excursion will help to explain the absence of a constitutionally entrenched rights protecting statute until recently.

I. A Brief Historical Excursion

No one could credibly claim that Canada was home to rampant abuse of citizen rights in the pre-Charter era (1867–1982). There had, of course, been

[8] With regard to Canada this was a "conscious and habitual strategy of avoidance by which many of the 'big' questions were put aside or the response interminably delayed until some acceptable state of ripeness had blossomed (…) Basic constitutional issues were repeatedly shelved." (Alan C. Cairns: *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart Inc. 1995), at p. 103). On the EU pre-Maastricht, see for instance Joseph H. H. Weiler: *The Constitution of Europe, 'Do the New Clothes Have an Emperor?' and other Essays on European Integration* (London: Cambridge University Press 1999).

rights abuses by governments, and they were cited in the build-up to the Charter as justification for adding a rights-protecting instrument to Canada's constitutional framework. By themselves, however, they would not have provided enough momentum to institute an entrenched charter.

The 1982 Charter was a late arrival on the Canadian constitutional scene. For the first century following Canada's founding (1867), advocates of entrenched rights were a distinct minority. The idea of an entrenched charter or bill of rights could be, and was, portrayed as alien, as un-British and therefore un-Canadian, or phrased differently as an American idea, and therefore un-Canadian. Canada was founded in 1867 with a constitutional framework in which parliamentary responsible government and federalism, capped by constitutional monarchy, were the central institutional pillars. The confederation task was to bring together politically organised communities into a new federal nation, not to create a new nation of rights bearing individuals. In any event, rights were thought to be politically secured by the inheritance of the British political tradition. The rights that Englishmen carried around the globe were considered superior to rights whose effectiveness depended on their codification.

The fact that the separate colonies with their own governments pre-existed the move to Confederation meant that if some form of union was to take place federalism was the obvious response. The choice of federalism received additional support from the expectation that the new dominion would expand to the Pacific coast to incorporate British Columbia, and would seek to include Prince Edward Island and Newfoundland, which had resisted initial entreaties to join the new country. The combination of geography and the distinct local identities of the separate colonial communities therefore allowed no alternative to federalism. This conclusion was reinforced by the fact that the attempted creation of a single political community in the United Province of Canada, formed in 1841, and bringing together the future provinces of Ontario (then Upper Canada) and Quebec (then Lower Canada) had clearly failed, with the consequence that the breakup of the United Province into its two component parts was inevitable. For the future Ontario and Quebec, which contained the bulk of the population of the emerging new country, and had been joined in an unhappy constitutional marriage for a quarter of a century, Confederation was a deeply desired coming apart as a prerequisite to the larger coming together with other colonies in the central government of the new nation. In sum, the political facts at the time of Canada's founding, and those that would follow the anticipated expansion of Canada to the west coast – thousands of miles away – meant that federalism, so to speak, chose itself.

British responsible government also triumphed because no competitor surfaced as a reasonable challenging alternative. The separate colonies which came together to constitute Canada already enjoyed their own British system of parliamentary government, linking the political executive to

the legislature, and were unwilling to give it up. It also followed that the new central government which would cap the emerging federal system would almost automatically adopt the responsible government model already in place in the colonies.

Responsible parliamentary government in the separate colonies rested on and nourished a strong sense of local (later provincial) identity. It was assumed that over time the same system in the central government would contribute to an emerging Canadian identity. For the colonists, responsible government was a proud confirmation of their British heritage. They were not rebelling against their British past as they worked to create a new country. They were simply rearranging their relationship with each other, while retaining their patriotic connection with the 'motherland.' While the francophone population of Quebec was naturally less inclined to relate to Great Britain with the same kin-inspired loyalty as were British colonists, they had negligible counter-allegiance to France and neither sought nor found constitutional inspiration from that country. France, in other words, was not a 'mother country'. Finally, separation of the Presidential executive from the legislature in the next-door American example, which in some circumstances might have provided a counter-model, was incapacitated for that task by the civil war – 1861–1865 – which colonists north of the border often attributed to faulty American constitutional arrangements. In these circumstances, the American Bill of Rights, which was associated with those arrangements, was not championed by the Canadian constitution-makers.

Parliamentary responsible government with its partner constitutional monarchy were selected, among other purposes, for their nation-building capacities. The imperial British presence in the form of constitutional monarchy at the head of the federal and provincial governments served a nation-building purpose by differentiating Canada from its republican southern neighbour. It strengthened an imperial allegiance across the Atlantic to Great Britain. This psychologically gave Canadians a split identity, one branch of which was in Europe. This reassuringly contrasted Canada to the United States by underlining the absence of any revolutionary rejection of Europe in the Canadian founding. This symbolic separation from the American neighbour was nation-building by contrast. – 'We are not you.' – Responsible parliamentary government was nation-building in the more active sense that it facilitated strong executive leadership by the central government in the project of expansion. Finally, federalism with its sensitivity to local conditions was nation-building by facilitating the addition of new provinces. Given the impediments to central control of far flung territories, a unitary state, had it been selected, would have quickly foundered under the weight of centrifugal pressures.

The constitutional system established in 1867 still exists well into its second century – thus giving Canada one of the oldest uninterrupted constitutional systems in the contemporary world. This survival reflects the

obvious fact that Canadians have enjoyed a living constitution characterized by a high degree of de facto flexibility, which has compensated for the difficulty of formal constitutional change. In addition, of course, Canada has had the good fortune of geographical isolation from the wars of the 20th century, and thus has been spared both invasion and occupation. For Canadians, war happens elsewhere. The Canadian military experience has not involved physical defence of the homeland, but the sending of Canadian troops to fight or keep the peace in foreign lands.

This constitutional system, which differentiated Canada from the United States by, among other things, its conscious rejection of a Bill of Rights and by the relative absence of a revolutionary tradition, gained nourishment from the British connection. The imperial British context positively linked Canadians to a distinct British political tradition, and gave them a symbolically gratifying connection with a global imperial enterprise. A 'Constitution similar in Principle to that of the United Kingdom' in the words of the preamble to the British North America Act was for nearly a century seen as a source of pride, not as imitative colonial borrowing. In summary, for the better part of a century in post-Confederation Canada an adaptation of British constitutional theory and practice – federalism excepted – was comfortably applied in Canada. This nation-building without a charter might be inelegantly labeled diaspora constitutionalism, the migration of a tradition.

This old world view declined in legitimacy as the supporting assumptions which had sustained it weakened. A 'Constitution similar in Principle to that of the United Kingdom' lost some of its lustre as the British Empire shared the fate of other global European empires in the first two decades following WW II. The gratifying imperial red on the global map, which had given Canadians an identity far beyond the capacity of a relatively small country to sustain, shrank to a few slivers as the Empire retreated when confronted with colonial nationalism. Simultaneously, Canadian trade with the United Kingdom, which had earlier been Canada's prime market, as well as an important source of Canadian imports, shrank to almost negligible proportions. In 1910, 50 % of Canadian exports went to the United Kingdom, and 37 % to the United States. In the same year, 26 % of imports came from the United Kingdom and 59 % from the United States.[9] In 1995, by contrast, merchandise exports to the United States were 80 % of the total, and imports from the United States were 75 % of imports total. By the mid-nineties, only 1.5 % of Canadian exports went to the United Kingdom, and 2.4 % of our imports came from the former 'mother country.' Imports from and exports to Japan in the mid nineties were, respectively, 4.5 % and 5 %, putting Japan

[9] Canada: Canada One Hundred 1867–1967 (Ottawa: Dominion Bureau of Statistics 1967), pp. 260–261.

ahead of the United Kingdom as a trading partner.[10] Accordingly, the imperial connection came to have less and less practical significance and symbolic importance for Canadians.

In the sixties, a profound relaxation of immigration criteria in response to an anti-racist international climate fundamentally transformed the ethnic demography of the Canadian population. Between 1961–1971, 75 % of Canadian immigrants came from the United States (6 %) and Europe (69 %). Between 1981 to 1991, two decades later, 70 % came from Asia (48 %), Africa (6 %) and the Caribbean, South and Central America (16 %).[11] The official policy of multiculturalism, adopted in 1971 in response to pressures from Ukrainian and other European background Canadians who feared being excluded by a two nations policy that singled out French and English Canadians as founding peoples, was pulled in a multiracial direction by the dramatic increase in non-European background immigrants. This changed ethnic demography further weakened the link with the United Kingdom, reduced trust in majorities and generated potential supporters for a charter of rights.

II. The Canadian Charter and its Sources

The idea of an entrenched charter was given additional stimulation by a global rights consciousness fed by the United Nations. The Universal Declaration of Human Rights (1948) was followed by a succession of rights instruments. These were triggered by the third world majority in the United Nations General Assembly, with fresh memories of the denial of rights in the colonial era, and by the brutalities of WW II, specifically the Holocaust. Post-Holocaust, benign beliefs in the trustworthiness of governments were put on the defensive. As the idea of entrenched rights became a powerful norm, countries without them could be seen as defying the spirit of the times. Writing in 1968, the Canadian legal scholar Maxwell Cohen asserted that "Human rights became (...) within the past twenty years, an important piece of 'debating' language (...) part of the political dialogue, part of the debating experience of peoples in all parts of the world, even those in affluent societies".[12] Even in the United Kingdom, where the principle of parliamentary sovereignty was deeply embedded in the political culture, and the common law was lauded for its capacity to protect human rights, "a consensus slowly emerged in the legal establishment and the civil rights community that the common law alone was no match for the expanding

[10] Canada: *Canada Year Book* (Ottawa: Statistics Canada 1997), at p. 296.
[11] Canada: *Canada Year Book* (Ottawa: Statistics Canada 1997), at p. 67.
[12] Cited in Alan C. Cairns: *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal & Kingston: McGill-Queen's University Press 1992), pp. 28–29.

power of the media and the executive and could not be left to provide the necessary safeguards against abuse". By the mid-nineties, the United Kingdom came to be seen as a laggard in protecting rights, "as suffering from a human rights deficit".[13]

The initial Canadian response, following several post-war inquiries by parliamentary committees, was the 1960 Bill of Rights. The 1960 Bill was an ordinary statute. It did not apply to the provinces which had long been considered more likely to violate rights than was the federal government. It was unaccompanied by significant public mobilization. Hence its public roots were shallow. Unsurprisingly, the judiciary did not treat the bill as an invitation to play a vanguard role in the defence of rights. By 1982, when the Charter of Rights came into effect, only one statute had been struck down for being in violation of the Bill.[14]

Nevertheless, the Bill of Rights accustomed Canadians to the idea that in normal circumstances parliamentary majorities might be limited by a body of rights beyond the reach of legislatures. Further, the 1960 Bill of Rights had, among its other objectives, a nation-building purpose, as did the later 1982 Charter. The Bill's sponsor, Prime Minister John Diefenbaker, of German background, saw the Bill as homogenizing the Canadian identity by doing away with the concept of hyphenated Canadians. He viewed the latter as creating a hierarchy in which Canadians of British and French backgrounds were at the top of a hierarchical allocation of status. By contrast, the uniform possession of rights on a country-wide basis would, in a sense, level the citizenship playing field by wiping out invidious distinctions based on time of arrival in Canada, and on ethnic background.

Twenty-two years after the 1960 Bill of Rights, the 1982 Constitution Act gave Canadians an entrenched Charter of Rights and Fundamental Freedoms. While it is tempting to explain the Charter as a response to a history of rights violations, to do so would be wrong.

Advocates of a charter of rights for Canada did not lack ammunition from the Canadian past. Texts on the background of the Charter cite, among other examples, the WW II internment of Japanese Canadians, the ambiguous position of Indian peoples - with a few exceptions, deprived of the franchise until 1960 – the insensitivity of the Duplessis regime in Quebec (1936–1939**;** 1944–1959 – the year of Duplessis' death), and various other incidents.[15] While such examples of rights abuses could be and were cited as supports for

---

[13] Kate Malleson: "A British Bill of Rights: Incorporating the European Convention on Human Rights," in *Choices: Judicial Power in Canada and Britain,* 5:1 (1999), pp. 21-42, at pp. 24.

[14] Regina v. Drybones [1969] S.C.R. 282.

[15] Walter S. Tarnopolsky: *The Canadian Bill of Rights*, 2nd rev. ed. (Toronto: McClelland and Stewart 1975), at pp. 3–14; Cynthia Williams: "The Changing Nature of Citizen Rights", in Alan Cairns and Cynthia Williams (eds.): *Constitutionalism, Citizenship, and Society in Canada*, vol. 33 of the research studies of the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press 1985), pp. 99–131, at pp. 100–104.

a Canadian charter no reasonable analyst could successfully argue that Canadians were groaning under a tyranny, or that in the world of actually existing political systems Canada could be ranked outside the top tier of those polities whose citizens already enjoyed the various protections that charters were designed to institute.

If the source of the Canadian Charter does not lie in a shameful Canadian past from which an escape was sought, where does it lie? A contributing factor was the diminished prestige of parliamentary regimes. The United Kingdom, with a disappearing empire, a diminished status as a world power, and reduced trade and immigration links to Canada, no longer endowed parliamentary regimes in Canada or elsewhere with vicarious prestige. Simultaneously, as already noted, parliamentary regimes whose governments were not constrained by courts and constitutional charters began to appear anachronistic when viewed from the perspective of an emergent international human rights regime. This latter phenomenon, the focus of a massively proliferating and overwhelmingly positive literature of analysis, unquestionably contributed to the adoption of the Canadian Charter. Its role, however, was facilitative rather than determining.

The triggering factors were domestic, not of rights abuses but of trends in Canadian federalism. The hegemony of the central government, given initial sanction in the original 1867 Confederation agreement, and which – after the cyclical fluctuations common in federalism – vigorously re-emerged in WW II and was sustained in the early post-war years, was in retreat by the sixties.

The strongest challenge to the leading role of the central government came from a state-centred Quebec nationalism supported by all provincial parties in Quebec since 1960. The emergence of the independence oriented Parti Québécois (PQ) in 1968 raised the stakes to such an extent that the possible breakup of Canada was openly discussed. The gravity of the situation was underlined when the PQ won power in 1976, and promised a referendum on Quebec independence during its first term in office. (The referendum, based on a convoluted question, took place in 1980, and was lost to the federalist forces led by Prime Minister Trudeau.)

Concurrently, other provinces, especially Ontario, British Columbia and Alberta, were actively involved in a creative process that came to be called province-building. All provincial governments, with that of Quebec leading the way, were busily constructing provincial societies. Responsible parliamentary government based on increasingly competent provincial bureaucracies pursuing provincial goals was seen by the federal government as an agent of a threatening centrifugalism.

To Prime Minister Trudeau, these trends, particularly the independence strand in Quebec nationalism, had to be challenged by a reinvigorated pan-Canadian nationalism which could counter the provincialising of Canadian society. The Charter was the key instrument in

the counter-attack he mounted against provincialising trends which he saw as weakening the Canadian nation, and the federal government which spoke for it.

At its deepest level, the Charter was an instrument to nationalize the psyche of the citizenry. Its goal was to keep alive and strengthen a counter-vision of Canada which would challenge and weaken provincialism, either of the threatening Quebec nationalism variety, or of the less culturally based province-building drives outside of Quebec. The Charter and the new responsibilities it gave to the Supreme Court "was a major part of Trudeau's vision to unify Canadians around a distinctly Canadian concept of citizenship. In no small part this movement was designed to defuse the nationalist sentiment in Quebec by articulating a pan-Canadian national identity and by drawing the attention of all Canadians to a 'higher' set of values".[16]

These political, nation-building goals provided the impetus for the Charter. The protection of rights was secondary, or in different phraseology was a key instrument for the Charter's political objectives. Minority language rights, English in Quebec, and French outside Quebec, were given constitutional recognition, particularly in the field of education. Minority French language rights were designed to strengthen the claim that the French language could flourish outside Quebec, and thus to weaken the Quebec government thesis that only in Quebec and with the sympathetic support of the Quebec government could the French language thrive. Simultaneously, the Charter's support of the language rights of the minority English language community in Quebec was to be a constant reminder that there were two historically based languages in Quebec – that Quebec was a homeland to more than francophone Quebeckers.

More generally, the protection of rights from violation by either level of government was intended to underline the idea that the rights in question were Canadian rights. This overall message was reinforced by section 23 of the Charter with its guarantee of "minority language educational rights" for "English or French linguistic minority population(s)" in the provinces; – by section 27 which required Charter interpretation to be "consistent with the preservation and enhancement of the multicultural heritage of Canadians"; – by section 28 which guaranteed Charter rights and freedoms "equally to male and female persons;" – and by the equality rights of section 15, particularly by subsection 2 of section 15 which allowed affirmative action for the "amelioration of conditions of disadvantaged individuals or groups". The Charter was designed to wean individual citizens from provincialism and recruit them to the Canadian cause, leading to a

[16] Frederick Vaughan: "Judicial Politics in Canada: Patterns and Trends", *Choices: Judicial Power in Canada and Britain, Choices,* 5:1 (1999), pp. 4-20, at p. 12. See also Jeremy Webber: "Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms", *Canterbury Law Review*, 5 (1993), pp. 207–234, at pp. 208–209.

strengthened pan-Canadian identity based on common country-wide citizen possession of rights. A separate clause in the Charter[17] protected "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" from abrogation or derogation by the Charter.

The dramatic setting for the Charter's introduction underlines its role as an instrument of the central government in the Quebec-Ottawa confrontation, and more generally in the federal-provincial struggle. Following the 1980 Quebec government referendum, decisively won by the federalist forces 60–40 %, which had asked the Quebec electorate to give the Quebec government authority to negotiate a sovereignty-association agreement with Canada, the federal government of Prime Minister Trudeau launched a major effort to amend the British North America Act. The centre piece of its proposal was a Charter of Rights, supplemented by an amending formula designed to bring the Canadian constitution home. (Amazingly, more than a century after Confederation, formal amendment of major clauses of the British North America Act, which was a British statute, could only be implemented by British legislation.)

The play of forces in the 1980–82 constitutional process which led to the Charter was remarkably revealing. While the federal government was the catalyst for the Charter, initially supported by governments of only two of the ten provinces – Ontario and New Brunswick – the Charter proposal attracted massive public support. Parliamentary government, long considered along with federalism to be the centre-pieces of Canadian constitutional identity, was clearly on the defensive. The eight provincial governments opposed to the Charter appeared to be speaking for yesterday's Canada. To the Charter's public supporters a constitution which spoke the language of federalism and parliamentary government and little else appeared to address the concerns of governments and to overlook the widespread public desire for constitutional recognition offered by the Charter. Clearly, a contagious international language of rights had helped to undermine the support for a nineteenth century constitutional inheritance which rested on different constitutional principles.

The provincial government opponents of the Charter fought a delaying battle – including resort to the courts, and to lobbying efforts in London to induce the British parliament to reject any unilateral federal government request for a constitutional amendment. Ultimately however, with the very important exception of Quebec, they agreed to a revised constitutional package which included their acceptance of the Charter (slightly modified) and an amending formula originally proposed by the eight dissenting provinces (also slightly modified.) In a major concession to its provincial government opponents, the Charter contained a 'notwithstanding' clause (section 33), which allowed the federal parliament or a provincial

[17] Section 25.

legislature to declare that a legislative provision in violation of certain Charter clauses (sections 2 and 7 to 15) should nevertheless be legally valid for a renewable five year period.[18]

The Charter's legacy is a profoundly transformed constitutional culture and the unfinished business of the Quebec government's continuing opposition to the 1982 Constitution Act. For Quebec Prime Minister Rene Levesque the 1982 Constitution Act was a great betrayal of Quebec, mainly because of what he pejoratively referred to as that "bloody Charter".[19]

The opposition of the PQ to the Charter was in part opposition to its language clauses which modified Quebec's provincial language regime.[20] Two additional factors contributed to the opposition. The Quebec Charter (1975) was an instrument of Quebec nation-building. The Canadian Charter was an instrument of Canadian nation-building. Given the fact that the 1980 Quebec referendum had been a Quebec government instrument to break away from Canada into some version of sovereignty-association, the Canadian Charter was a humiliating confirmation that the Quebec government had gambled and lost badly. This was underlined by the fact that the Constitution Act 1982, including the Charter, was patriated without approval by the Quebec government or the National Assembly. Language clauses excepted, however, the Quebec opposition to the Charter was less directed to the Charter's substance[21] than to the above-noted context of its introduction and to its political purposes – to strengthen identification with the pan-Canadian community that the independentistes had hoped to leave.[22]

---

[18] For a discussion: Howard Leeson: "Section 33, The Notwithstanding Clause: A Paper Tiger?", *Choices: Section 33, The Notwithstanding Clause: A Paper Tiger?*, 6:4 (2000), pp. 3-22.

[19] Cited in Alan C. Cairns: *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal & Kingston: McGill-Queen's University Press 1992), at p. 121.

[20] "From the outset, it was clear that the Charter would conflict with Bill 101. By some readings a major purpose of the Charter's guarantee of minority language education was to invalidate the restrictions that prevented anglophone Canadians from sending their children to English schools in Quebec." From Kenneth McRoberts: *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press 1997), at p. 181.

[21] McRoberts observes that Quebec's opposition to the Charter "did not stem from the various rights enumerated in it. An analysis of public opinion in the mid-1980s found that 'with respect to ideas about basic rights and freedoms' there were no significant differences between French Canadians and English Canadians". See McRoberts, *supra*, fn. 20, at p. 180.

[22] "A second difficulty with the Charter of Rights and Freedoms was the pan-Canadian nationalism with which it is so intimately linked. By definition, a measure that tries to standardize rights throughout Canada as a whole, within provincial as well as federal jurisdictions, is antithetical to Quebec's claim to distinctiveness within Canada. In defining basic rights that all Canadians should enjoy, wherever they live, it reinforces the notion of Canada as the pre-eminent national community" See McRoberts, *supra*, fn. 20, at p. 181.

III. The Canadian Charter Experience

Two decades later, the Charter remains very popular, supported by over 80 per cent of Canadians.[23] It has given birth to a new social category, self-labeled as Charter-Canadians. Occasionally a distinction is made between a 'Citizens' constitution, focused on the Charter and a 'Governments' constitution focused on federalism and parliamentary government. While the preceding is an oversimplification, it nevertheless underlines the reality that the existing constitution contains internal tensions or contradictions in that citizens and governments relate positively to different parts of the revised constitutional arrangement.

The Charter has given the constitution a popular base. It speaks directly to the citizenry. It is clothed in the symbolism of popular sovereignty. In a very short period of time, it has become a very high profile popular institution in the overall constitutional order. Surveys in 1987 and 1999 reported over eighty percent of Canadians who had heard of the Charter saw it as "a good thing (...) for Canada". There were strong supportive majorities in every region of the country. In the 1999 survey close to 90 % of Quebecers who had heard of the Charter viewed it positively. Even Bloc Québécois supporters expressed very strong support for the Charter.[24] Mary Dawson, Associate Deputy Minister, Constitutional Affairs, Department of Justice in Ottawa. notes the "remarkable (...) extent to which [the Charter] (...) has become a symbol of pride and a source of identification for Canadians, thus becoming a unifying force as had been hoped".[25]

There is widespread agreement that Canadians have experienced a Charter revolution. The Charter has given birth to a vigorous rights-oriented discourse and a dramatic increase in the propensity to litigate.[26] Particular clauses have their own clientele. Ethnocultural minorities see their reflection

---

[23] Vaughan refers to "the enthusiastic popular acceptance of the Charter (...) there can be no question that Canadians have embraced the Charter. Clearly, the Charter has provided Canadians with an indigenous point of national coalescence." (Vaughan, *supra*, fn 16, at p. 13.) Sigurdson asserts that "Canadians, it would seem, have not only become used to life after the Charter, but recognize the Charter as a valuable and authoritative symbol of this country's commitment to freedom, equality and human dignity". (Richard Sigurdson: "Left and Right Wing Charterphobia in Canada: A Critique of the Critics," *International Journal of Canadian Studies*, no. 7–8 (1993), pp. 95–116, at p. 113.) According to Mary Dawson, the 1982 Constitution Act changes to the BNA Act "have (...) unleashed a dynamic of their own and have changed the way Canadians understand themselves as individuals". See Mary Dawson: "Governing in a Rights Culture", mimeo (2001), on file with the author, at p. 6.

[24] Joseph Fletcher and Paul Howe: "Canadian Attitudes Toward the Charter and the Court: Results of a recent IRPP Survey in Comparative Perspective", mimeo, presented at the annual meeting of the Canadian Political Science Association, Sherbrooke, June 8 (1999), pp. 4–6.

[25] Dawson, *supra*, fn 23, at p. 2.

[26] Gregory Hein: "Interest Group Litigation and Canadian Democracy", *Choices: Interest Group Litigation and Canadian Democracy,* 6:2 (2000), pp. 3-30, at p. 17.

in the s. 27 multiculturalism clause; the women's movement sees the s. 28 'guarantee of Charter rights and freedoms equally to male and female persons' as their achievement; official language minorities view s. 23 'minority language educational rights' as crucial supports for their linguistic survival; 'equality seekers,' as they have come to be called, view s. 15 as a powerful constitutional lever to advance their interests.

Although the label is controversial, Morton and Knopff have written of a 'Court Party' which employs the Charter in judicial arenas to pursue policy objectives less capable of achievement, they argue, in legislatures.[27] Although their interpretation is debatable, and strongly contested by legal academics,[28] it is clear that the Charter has greatly enhanced the role of the judiciary, especially the Supreme Court, in the overall constitutional order. The Supreme Court, to the surprise of commentators at the time of the Charter's introduction, who thought that ingrained deference to legislatures would lead to judicial restraint, has treated the Charter very seriously - although 'court-watchers', not surprisingly, describe fluctuations in the Court's treatment of Charter clauses.

Elsewhere in this volume, John Fossum assesses the position of the European Charter between 'deep diversity' (Charles Taylor) and 'constitutional patriotism' (Jürgen Habermas). An assessment of the Canadian Charter in terms of both criteria suggests the following:

1. Neither label was available in Canada's constitutional vocabulary in the period leading to the introduction of the Charter. Indeed, 'deep diversity' was introduced by Charles Taylor in 1991 as a stinging critique of the clash between the equal rights message of the Charter and the need to recognize the deep diversity of Quebec.[29] In slightly different language, the francophone Quebec economist Pierre Fortin described the defeat of the Meech Lake Accord as the triumph of the Charter over Quebec's 'distinct society' definition in the Accord.

2. The political purposes of the Charter -to weaken provincialism and strengthen the pan-Canadian community – were not highlighted in the politics leading up to the Charter's introduction. To do so would have made all too clear the Charter's role as, among other things, a federal government weapon in the unceasing intergovernmental struggle for recognition and jurisdiction.

---

[27] F. L. Morton and Rainer Knopff: *The Charter Revolution and the Court Party* (Broadview Press: Peterborough 2000).

[28] See Kent Roach: *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law Inc. 2000); Peter W. Hogg: "The Charter Revolution: Is It Undemocratic?", *Constitutional Forum*, 12 (2001/2002), pp. 1-8.

[29] Charles Taylor: "Shared and Divergent Values," in Ronald L. Watts and Douglas M. Brown (eds.): *Options for a New Canada* (Toronto: University of Toronto Press 1991), pp. 53–76, at pp. 74–76.

3. The early tendency to discuss the Charter in terms of the rights it was to protect and the recognitions it was to grant was facilitated by the lead role of lawyers in the discussion, many of whom were oblivious of the Charter's 'nation-building' political purposes. In addition, few citizens' groups which appeared before legislative committees in the constitution-making era – 1980–1982 – were fully aware of the transformation in the role of the constitution in which they were participating.

4. It is difficult to make a case for the Charter as an instrument of 'deep diversity' recognition in Taylor's sense. Taylor didn't think it was. The government of Quebec systematically used the 'notwithstanding clause' (s. 33) in the immediate post Charter years to block its application to Quebec, fought the legality of the 1982 Constitution Act in the courts (and lost), and denied the Charter's legitimacy when they were no longer able to challenge its constitutionality.

The other 'deep diversity' – the Indian, Inuit and Metis peoples – received a major recognition breakthrough in s. 35 of the 1982 Constitution Act – but this was outside the Charter. Indeed, the Charter clauses that referred to Aboriginal peoples had the goal of protecting treaty and aboriginal rights against the Charter's application. Further, First Nations, scholars, and the major aboriginal organization – the Assembly of First Nations – vigorously denied the appropriateness of the Charter's application to First Nation governments.

5. Given the preceding, should the Charter be viewed as an instrument of constitutional patriotism? With the necessary reminder that a rights-based constitutional patriotism does not draw its sustenance from an abstract body of rights drawn from the western tradition, but is always subject to some tailoring to ensure its fit with society, constitutional patriotism clearly fits the case of the Canadian Charter.

6. The Charter arrived on the Canadian scene at an opportune moment. The Britishness of the pre-Charter written constitution no longer had the majesty of the prestige-giving constitutional way of life of its predecessor in the imperial era. This manifested itself in a gap in Canadian constitutional arrangements, especially at a time when a global rights revolution was transforming the meaning of citizenship for a better educated and less deferential electorate.

Conclusion

When Chou en Lai was asked what he thought of the French revolution, he reportedly replied that "It's too early to tell". The same cautious response is appropriate when we are asked of the long-run impact of the Charter on the governments and citizens of Canada. Multiple actors in a scattering of institutions nudge the Charter toward their vision of a preferred future. Various citizen groups employ the courts to protect, or even more desirably

to enhance their Charter rights. Hein convincingly documents the dramatic increase in interest group litigation since the Charter, and concomitant changes in judicial culture. He writes of "identities energized by rights", whose possessors appreciate that "rights have a certain majesty (...) [that] can turn ordinary political demands into principles that have to be respected".[30] Unpredictable international influences modify the environment to which the Canadian state and its citizens respond. Security concerns, prominent since the threat of terrorism following the September 2001 Twin Towers destruction in New York, have vaulted to the top of the democratic policy agenda, reducing the salience of rights.

Given the domestic and international uncertainties that will affect the future role of the Charter, it is still possible to extract some preliminary assessments of its impact, in addition to those noted on previous pages.

- At a macro-constitutional level, the Charter has contributed to a major constitutional rearrangement. Legislatures have lost status to courts.[31] According to Mary Dawson, Associate Deputy Minister, Constitutional Affairs, Department of Justice in Ottawa, "power has flowed from the elected representatives to an appointed judiciary. These are clear facts".[32] The degree of deference that courts should pay to legislatures – often discussed as activism vs. restraint – elicits an unending, occasionally acrimonious debate. Federalism is challenged by non-territorial cleavages. The constitution itself has an enhanced status and profile in Canadian lives. The Charter's prominence has generated fundamental questions about the composition of courts, especially the Supreme Court, and how judges are appointed.[33] Representation on the Supreme Court is no longer seen exclusively in terms of regional/federal criteria, but also in terms of how many women, which ethnocultural minorities, and what policy orientations are or should be present on the Court.[34]

---

[30] Hein, *supra*, fn. 26, at p. 18.

[31] See Janet L. Hiebert for a proposal to rearrange the division of labour in Charter issues by the establishment of "a parliamentary Charter committee to scrutinize proposed legislation from a rights perspective". Cf. Janet L. Hiebert: "Wrestling with Rights: Judges, Parliament and the Making of Social Policy", IRPP, *Choices*, 5 (1999), pp. 3-36, at p. 36.

[32] Dawson, *supra*, fn. 23, at p. 16.

[33] Jacob S. Ziegel: "Merit Selection and Democratization of Appointments to the Supreme Court of Canada", IRPP, *Choices*, 5 (1999), pp. 3–24.

[34] As I write, the press reports that a recent poll indicated that two-thirds of Canadians support the election of Supreme Court judges, an opinion that was immediately rejected by Martin Cauchon, the Minister of Justice. (Luiza Chwialkowska: "Ottawa Says No to Electing Supreme Court", *National Post*, Feb. 5, A6 (2002). See also the editorial "Supremacy of the people," in the *National Post*, which sympathizes with voter frustration for what the editorial views as unbridled judicial activisim in Charter cases (Mary Dawson: "Supremacy of the People", Editorial, *National Post*, Feb. 5, A19 (2002)).

- There is no going back to a pre-charter world. The Charter's introduction may have been an experiment, but it is not an experiment that can be dropped. Although criticisms of the Charter flourish on both left and right positions on the political spectrum,[35] it remains remarkably popular. Arguments for its abolition are on the fringe of political discourse.
- The Charter's impact on public consciousness has become an impediment to major constitutional change. The 1982 Constitution Act contained fundamentally incompatible visions. The amending formula, the product of the provincial governments that opposed the Charter, assumed that the governments of the federal system should be the dominant actors in the process of formal constitutional amendment, checked only by the necessity of legislative approval, which might include public hearings. The vision here is of a "governments' constitution", for which federalism is the dominant organizing principle. The Charter, in contrast, asserted the priority of citizen rights, and for Trudeau asserted the sovereignty of the citizenry. This citizen-state axis stimulated by the Charter gives substance to what can appropriately be called the "citizens' constitution". The inevitable has happened. The public, infused with a rights consciousness based on its stake in the constitution, is unwilling to defer to the leadership of governments which the amending formula presupposes. As a result, both major efforts at constitutional change in the past two decades – the Meech Lake Accord 1987–1990, and the 1992 Charlottetown Accord – were defeated by public opposition. It is now commonly assumed that major constitutional change requires public approval in a referendum. The pursuit of such a goal is a very high risk endeavour that leads to a confrontation between supporters of the "governments' constitution" and supporters of the "citizens' constitution".
- The Charter enshrines equality of citizens as a fundamental constitutional principle, and derivatively the equality of provinces. The Charter invests the qualities it recognizes with a powerful "social symbolism". Its "great symbolic force tends to crowd out (...) respect for political autonomy" for sub-national governments. It generates pressure to accord high value to uniformity, and is thus hostile to the recognition of Quebec as a distinct society. Equality of citizens also sets limits to the differential treatment of Aboriginal peoples.[36] Thus, although the major Aboriginal organization, the Assembly of First Nations, has opposed the Charter's application to

[35] Sigurdson, *supra*, fn. 23.
[36] Webber, *supra,* fn. 16, pp. 215, 222, 223, 230.

Aboriginal self-government, the federal government has insisted on its applicability.

- The Charter has restructured constitutional discourse. The academic legal community, for whom 'rights' is a natural professional language, enjoys an enhanced role in constitutional advocacy and interpretation. The newly constitutionalized language of rights enjoys an uneasy relation with the historic constitutional language of federalism. The language of rights enhances the status of citizens in the constitutional order, and gives the latter a strengthened civic base.

The political purposes of the Charter are clarified by a brief historical reminder of the distribution of support for and opposition to the idea of constitutionally protected rights from 1960 to the present. The 1960 Diefenbaker Bill of Rights, conceived as a nation-building instrument, was resisted by the provinces and as a result applied only to the federal government. The federal government sponsored Charter in 1980 was initially opposed by eight of ten provinces, who correctly saw that the floor of rights it proposed was clearly intended to strengthen a pan-Canadian citizen identity. Significantly, the 'notwithstanding clause',[37] which allows a limited capacity to exempt legislation from Charter scrutiny, was a concession to the provinces, and was agreed to with great reluctance by the federal government. For Quebec nationalists, the Canadian Charter has been seen from the beginning as the servant of a rival Canadian nationalism hostile to special constitutional status for the Quebec nation.

The strongest continuing opposition to the Charter comes from elites claiming to speak for the 'nations within', the Quebec nation and Aboriginal nations, especially Indian First Nations. In both cases, they see the Charter as a threat to their own nationalist ambitions. The Charter is correctly seen as an instrument designed to weaken the allegiance of 'their people' to 'their nation' by linking them to the Canadian constitutional order by the vehicle of rights. The fact that Quebec support for the Charter is very high, in line with other Canadians, suggests, tentatively perhaps, that the Charter is serving a national unity function. The additional fact that the Native Women's Association of Canada has played a vanguard role in arguing that the Charter should apply to Aboriginal governments suggests, possibly even more tentatively, that the Charter may have a much broader Aboriginal constituency than is suggested by the rhetoric of its claimed incompatibility with Aboriginal values, as argued by Mary Ellen Turpel.[38]

---

[37] Section 33.

[38] Mary Ellen Turpel: "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", *Canadian Human Rights Yearbook*, 6 (1989–90), pp. 3–45.

Neither the initial hegemony of the inherited British tradition of responsible parliamentary government, nor its subsequent supplementation by the 1982 introduction of the Canadian Charter can be understood without resort to exogenous factors. Responsible parliamentary government without a Charter was not so much selected in 1867, as inherited. It pre-existed Confederation in the separate colonies, and in the absence of any desire to end the imperial link with the mother country its transference to the newly created central government was almost automatic. Indeed, as late as the 1950s "almost all the common law world outside the US functioned without an entrenched bill of rights".[39] The subsequent diffusion of bills of rights throughout the common law world was fed by the European Convention, by the UN Charter, by the Universal Declaration of Human Rights, and by the UN Covenants on Human Rights. By 1980, fundamental rights codes had been adopted by twenty-four Commonwealth countries. New Zealand, Israel, Hong Kong, and South Africa, as well as Canada, all had various bills of rights by the 1990s.[40]

Both Canada without a charter and Canada with one were and are consonant in their time with messages from the international environment. Views of the natural and proper in state-citizen relations do not exist in isolation from the evolution of international norms of the practical meaning of statehood.

The coming of the Charter to Canada can be partially explained in terms of a developing, increasingly pervasive allegiance to the constitutionalisation of citizen rights as a protection against future abuses. This changed civic consciousness was fed by emerging international norms of citizen – state relations, developed in reaction to what Robert Conquest called "a ravaged century".[41] The implementation of the Charter, in the context of international pressures and messages which influenced both citizens and their political leaders, is a story of high constitutional politics in which rival governments in the federal system, and the spokespersons for 'nations within' battled over the Charter which they variously saw as an instrument which would serve or frustrate their ambitions.

---

[39] Malleson, *supra*, fn. 13, at p. 24.
[40] *Ibid*.
[41] Robert Conquest: *Reflections on a Ravaged Century* (New York & London: W. W. Norton 2000).

Chapter 6

New Values for Europe?
Deliberation, Compromise, and Coercion in Drafting the Preamble to the EU Charter of Fundamental Rights

Justus Schönlau

Introduction[1]

The process of drafting the EU Charter of Fundamental Rights in 2000 by the 'Convention (Mark I)' was the first attempt at a new method for constitutional change at EU level. With the process continuing in the 2002 enlarged Convention on 'The Future of the European Union', it is interesting to study in detail some of the aspects of the Conventional process in its first incarnation. Particular emphasis is given in this analysis to its capacity to produce agreement on deeply contested issues concerning the values underlying and shaping European identity, and, consequently, the legitimacy of the European polity. The present paper proposes a case study of the debates in the Charter Convention about the preamble to the Charter of Fundamental Rights (EUCFR).

By re-constructing the debates and consecutive drafts for the prologue to the Charter, it gives an insight into the state of the debate about Europe/the EU as a community of values in the early stages of the process which is expected to lead to the creation of a constitutional treaty for the EU in due course. At the same time, it focuses on the Convention as a deliberative setting in which, for the first time so publicly, the values and ideals underlying the integration process were discussed. In particular the debates about the preamble drew out the conflicting understandings and visions that members of the Convention brought to the debates, and ultimately produced a compromise text. The paper builds on the empirical evidence from the preamble discussions to investigate how different dynamics at different stages of the process influenced the results. The

[1] This piece is based on an extensive period of participant observation of the Convention drafting the EU Charter of Fundamental Rights. An earlier version of this paper was presented to the ARENA workshop 'The Charter of Rights as a Constitution-Making Vehicle', Oslo, 8/9. June 2001, to whose participants, in particular Erik Oddvar Eriksen, Andreas Føllesdal, John Erik Fossum, and Agustín José Menéndez I am grateful for comments and suggestions.

analysis shows clearly that the debates in the Convention plenary (early stages) were closest to the requirements of a genuine deliberative setting in which consensus can be found or constructed by involving all actors in an equal exchange of positions, leaving room for genuine persuasion to take place. The later stages of the process then became increasingly subject to political and external pressures, which meant that other methods of decision making (especially bargaining and even coercion) became more important.

This raises the question what guidance the Charter process as a 'test-run' for a new method offers to those currently involved in the new Convention. In the concluding section, a first comparison is attempted between the 2000 negotiations on the Charter and the deliberations taking place since early 2002 in the Convention on the Future of Europe. It is concluded that the Charter process with its more limited task, the smaller Convention and the lesser degree of political interest invested in it from the outset, was probably better suited to provide a deliberative arena than is the more 'loaded' process of drafting a European constitutional treaty.

I. The Charter Process and the European Values

The Charter process is significant for the trajectory of the integration project because the Cologne Council, in its conclusions ('Cologne mandate', see below), set up a new kind of body to fulfil the task of drafting a Charter of fundamental rights. This project was to bring hitherto unknown levels of transparency to the EU constitutional debate and tried new mechanisms for involving civil society actors and the applicant countries at the level of EU development that is, at least potentially, 'history making' in John Peterson's terms.[2] Moreover, the high key of the language of the Cologne text, and the individual and collective profile of the members of the 'Convention', raised high expectations with regards to the role the Charter and its drafting process can play in legitimising the European Union. Yet, both during the process and since the 'solemn proclamation' of the Charter at the Nice summit, criticisms have been manifold with regard to the Charter itself,[3] and to its limited bite as a 'mere' political declaration.[4] Yet beyond the debate about the substantive rights contents of the Charter, and its function as a part of a

[2] John Peterson: "Decision Making in the EU: Towards a Framework for Analysis", *Journal of European Public Policy*, 2 (1995), pp. 69–93.

[3] Emanuelle Bribosia: "La Protection des Droits Fondamenteaux", in Paul Magnette (ed.): *La Constitution de l' Europe* (Editions de l'Université de Bruxelles 2001), pp. 107-28; Bruno de Witte: "The Legal Status of the Charter: Vital Question or Non-Issue?", *Maastricht Journal of European and Comparative Law,* 8 (2001), pp. 81–89.

[4] European Parliament, 2000: Duff – Voggenhuber reports I and II on the Drafting of the EU Charter of Fundamental Rights, A5 0064/2000 (16.03.2000) and A5 00325/2000 (14.11.2000); Joseph H. H. Weiler "Does the European Union Truly Need a Charter of Rights?", *European Law Journal*, 6 (2000), at pp 95–97.

codified European constitution on the other, the process in the Convention brought to the fore in an unprecedented way the issues of the values underlying European integration. This makes the Charter project an important step of the European Union towards devising means to sustain its own, direct, 'post-national' kind of legitimacy.[5]

The question of the values underlying European integration is mentioned indirectly by the Cologne mandate which set the Charter process in motion when it proclaims that the "(p)rotection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy", and when it refers to the "constitutional traditions common to the Member States" as one source of fundamental rights in Europe.[6] While it was probably not the intention of the heads of state and government at their Cologne meeting to launch a general debate about Europe's value foundation, it soon became clear that an attempt to increase the Union's legitimacy by drafting a catalogue of fundamental rights would inevitably touch on the values which are supposed to justify the rights in question. The link between values and rights in legitimating a political order is complex.[7] These complexities became most visible in the debate about the Charter's preamble which aimed to clarify the link between Europe and its citizens in order to capitalise on the Charter's legitimating potential.

In this context, the language of the Charter and its symbolic appeal are important elements in the success or failure of the undertaking.[8] The preamble is of particular interest here because it contains programmatic declarations or 'mission statements'[9] both about the scope and purpose of the document, and of the European Union at large. The formulations found for the preamble of the Charter are the product of the interaction, within the Convention, of different views of what integration is all about. Thus the preamble lends itself as a case study of how the discursive construction of a common basis of values and principles developed in the Convention, and it represents the benchmark of agreement at this point in time. The debate about legitimacy of the European Union can thus rely on a much clearer set of criteria than before, which is now being deployed in the debates of the new Convention.[10]

---

[5] Erik O. Eriksen and John E. Fossum: "The EU and Post-National Legitimacy", ARENA Working Paper 00/26, Oslo.

[6] European Council: "Decision on Drawing Up a Charter of Fundamental Rights of the European Union", Annex IV to Conclusions of the Cologne Summit, 3./4.6.1999, available at http://db.consilium.eu.int/df/intro.asp?lang=en.

[7] John E. Fossum: "Constitution-Making in the European Union", in Erik O. Eriksen and John E. Fossum (eds.): *Democracy in the European Union* (London: Routledge 2000), pp. 111–140.

[8] Gráinne de Búrca: "The Drafting of the EU Charter of Fundamental Rights", *European Law Review*, 26 (2001), pp. 126–138.

[9] Christopher Lord and David Beetham: "Legitimizing the EU: Is there a 'Post-parliamentary Basis' for its Legitimation?", *Journal of Common Market Studies*, 39 (2001), pp. 443–462.

[10] European Commission: Communication "A Project for the European Union", COM (2002) 247 Final, 22.05.2002; Lord and Beetham, *supra*, fn. 9.

The next section thus presents the Cologne mandate in its ambiguous statements with regards to the Convention's task and the role of values and rights. Section III then looks at successive drafts and the ensuing debates about the preamble for the Charter and shows how different decision making methods such as deliberation, bargaining and coercion interacted in the process to produce an outcome which marks considerable progress with regards to the pre-Charter state of the EU value discourse, because it shows both the substantive agreement and its limitations. Section IV then highlights the influence of different institutional conditions on the likelihood of deliberative interaction and concludes by linking the Charter results to the current stage of the European value debate.

II. The EU Charter Initiative in Context

The conclusions of the Cologne summit of June 1999 declared that "(p)rotection of fundamental rights is a founding principle of the Union and an indispensable requisite for her legitimacy" and then stated that "(t)here appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens".[11] The European Council then set up a special body to draft such a Charter (details of which were spelled out by the Tampere summit in October 1999), which named itself 'Convention' with clear constitutional undertones. The Convention presented a draft Charter to the Nice summit in December 2000 where the text was formally 'proclaimed' by the presidents of the European Parliament and Commission, and the acting French presidency of the European Council.

The Cologne mandate shows clearly that at least its authors saw the main purpose of drafting a Charter in raising public awareness of the (already existing) level and mechanisms of fundamental rights protection in the EU. Moreover, the text quoted above is the clearest acknowledgement to date of a close (conditional) link between the legitimacy of the EU and respect for rights. At the same time, the phrase "(t)here appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights (...)" suggests that fundamental rights have become an issue for the Union only with the 'present stage' of its development. While it is true that the founding Treaties do not refer to fundamental or human rights, the European Court of Justice stated as early as 1969[12] that fundamental

[11] Cologne mandate, *supra*, fn. 6.
[12] Case 29/69 *Stauder vs. Stadt Ulm*, [1969] ECR 419.

rights of member states citizens might be affected by integration and the EU has commissioned several extensive reports on the question.[13]

Significantly, the actual justifications of these rights themselves (i.e. the fundamental values underlying integration) are not referred to in the Cologne mandate, because they are supposed to be already commonly present in the various sources of fundamental rights quoted in the following parts of the Cologne mandate, most notably the European Convention of Human Rights and Fundamental Freedoms ('ECHR' of 1950) and in the "(...) constitutional traditions common to the member states, as general principles of Community law".[14] The task of the Convention, therefore, could be seen quite simply as collecting the rights from these sources and listing them in a way that was more visible and accessible to the citizens.[15] Yet, the precise scope of this task and the list of sources of fundamental rights mentioned in the Cologne conclusion were by no means commonly agreed within the Convention, precisely *because* the origin of the rights in question was contested. As the ensuing controversy about the Charter's legal status reveals, there are many who reject the view that all the rights which found their way into the Charter are self-evidently common to all member states.[16]

The interesting result of the Charter process is nevertheless that, despite these disagreements (particularly prominent during the exchanges about the preamble), a document was drafted on which all but two of the Convention's 62 titular members agreed on October 2nd 2000.[17] Part of the reason for this success was clearly the pressure on the Convention as a whole to 'deliver' and a resulting willingness among members to strike bargains even on sensitive issues. At the same time, the style of the debate in large parts does suggest that a genuine broadening of common understanding and mutual persuasion played an important part in concretising the very general agreement on the principles of "liberty, democracy, respect for human rights and fundamental freedom, and the rule of law" (Art. 6 TEU). While some

---

[13] Philip Alston (ed.): *The EU and Human Rights* (Oxford University Press 1999) (survey prepared for the 1999 report of the Comité des Sages); Jo Leinen and Justus Schönlau "Die EU Grundrechtecharta – Visitenkarte für Europa", in Sylvia-Yvonne Kaufmann (ed.): *Grundrechtecharta der Europäischen Union* (Bonn: Europa Union Verlag 2001).

[14] This formula is taken from the ECJ's ruling *in Internationale Handelsgesellschaft vs. Einfuhr- und Vorratsstelle Getreide*, Case 11/70 [1970], ECR 1125, at p. 1134.

[15] Lord Peter Goldsmith, interview 17.07.2000; Lord Peter Goldsmith: "Consolidation of Fundamental Rights at EU Level – the British Perspective", in: *The EU Charter of Fundamental Rights – Text and Commentaries* (London: Kogan Page for the Federal Trust 2000), pp. 27–38.

[16] See contributions in: *The EU Charter of Fundamental Rigths – Text and Commentaries* (London: Kogan Page for the Federal Trust 2000). The question of the incorporation of the Charter into the EU Treaties/ constitution is now of course debated in the new Convention (Convention 2002: "Mandate of the Working Group on the Charter", CONV 72/02, 31.05.2002).

[17] The two members who communicated their disagreement to the presidium of the Convention were Georges Berthu, French Member of the European Parliament's UEN Group (Europe of the Nations) and Jens-Peter Bonde, Danish Member of the European Parliament's EDD Group (Europe of Democracy and Differences).

legal questions remained controversial until the end, the preamble reflects a growing consensus on what is understood by these principles, and that one function of the Charter is to spell them out. Thus the Charter negotiations brought elements of a deliberative process to the "constitutional level" which is likely to contribute to the development of a broader "constitutional discourse" by increasing the emphasis on the idea of "legitimation through rights".[18]

A large number of the Convention members seemed to be acutely aware of this 'constitutional significance' of their undertaking.[19] Asked what they saw as the main task of the Charter, several members of the Convention went beyond the tasks of the Cologne mandate and expected their work, amongst other things, to "(...) open a constitutional process in Europe" (Johannes Voggenhuber, Green MEP), "(...) to show the citizen the added value of Europe, (...)" (Stefano Rodotà, Italian Government Representative), and to "(...) concretise the European order of values" (Jürgen Meyer, German Parliament Representative). At the same time, there were those Convention members who stressed the limitation of the Charter's mandate and saw its task only as "(...) making existing rights visible" (Lord Peter Goldsmith, British Government Representative), or put the main emphasis on the need to "(...) subject EU powers to controls and the rule of law" (Guy Braibant, French Government Representative). Yet, as Grainne De Búrca notes, "(...) the contested nature of the process, far from leading to deadlock or undermining its integrity, is unlikely to prevent the activities and results of the past year from themselves forming a significant stage of a future constitutional settlement'.[20] This does, however, also mean that important parts of the difficult aspects of the negotiations have merely been postponed, to be dealt with by the new Convention (see below). In any case, the pragmatic approach by the Convention's president Roman Herzog, to draft the Charter 'as if' it was going to become legally binding, did indeed successfully prevent deadlock on the broader constitutional implications of the project, but these questions did emerge again in the debate about the preamble.

---

[18] Jon Elster: "Introduction" and "Deliberation and Constitution Making", in Jon Elster (ed.): *Deliberative Democracy* (Cambridge: Cambridge University Press 1998); see also Fossum, *supra*, fn. 7.

[19] The following is based on interviews with 23 members of the Convention conducted during the Convention's work, for Justus Schönlau: Doctoral thesis*: The EU Charter of Fundamental Rights – Legitimation through Deliberation* (Reading: University of Reading 2001).

[20] De Búrca, *supra*, fn. 8.

III. Drafting the Preamble

A) The Need for an Introduction

In the early stages, there was disagreement in the Convention about the need for a preamble and its precise function. On the basis of a proposal by three Italian members of the Convention, the Convention meeting of May 12th debated the question of a preamble.[21] On this occasion, some were passionately arguing against a preamble (especially Johannes Voggenhuber),[22] and others thought it was superfluous because the Charter should become part of the Treaty and would thus be 'covered' by the Treaties' preambles (Jo Leinen MEP,[23] Peter Altmaier[24]). On the other hand, there were those who saw the preamble precisely as a chance to highlight the 'added value' of the Charter (Stefano Rodotà).[25] There was also disagreement as to what a preamble would have to achieve: Peter Mombaur stressed its function of putting the Charter in its 'historical context' while Voggenhuber argued that the rights concerned here were on the contrary meant to be 'timeless' and universal.[26] Also the controversy about a possible reference to Europe's religious heritage surfaced for the first time.[27] These early statements of profoundly differing understandings of both the nature of the rights in question, and of the preamble's function for the whole document are important markers against which to measure the ultimate agreement on a preamble draft.

Despite these differences, a majority of Convention members who intervened in this first debate seemed to be in favour of some kind of preamble. In reaction, the presidium put forward its own first draft on July 14th.[28] After this initiative it was not contested anymore that a preamble would form part of the final document.[29] In line with the 1969 "Vienna Convention on the Law of Treaties between States", Article 31.1 of which specifies that "(...) the text*, including its preamble* and annexes (...)" (as well as other documents relating to the treaty) provide "(t)he *context* for the

[21] Draft Preamble by Andrea Manzella, Elena Paciotti, Stefano Rodotà, Document CONTRIB 175, 17.05.2000 (circulated already on 10.05.2000).
[22] Voggenhuber in EP Delegation Debate, 17.05.00, but later Voggenhuber did submit his own proposal for a preamble (in a letter to Méndez Vigo "Bemerkungen zu Konvent 45", 31.08.2000).
[23] Jo Leinen, Convention Debate 12.05.00.
[24] Peter Altmaier, Convention Debate on 12.05.00.
[25] Stefano Rodotà, Convention Debate on 12.05.00.
[26] EP Delegation Debate on 17.05.00.
[27] Exchange between van Dam/van den Burg, Convention Debate 12.05.00.
[28] Document Convent 43, 14.07.2000.
[29] Even strongly Charter-Critical Convention member George Berthu did not object to having a preamble and intervened actively in the debate on 19.07.2000.

purpose of the interpretation of a treaty (...)",[30] the preamble and its language are thus important markers as to the political role and grounding of an international legal document like the Charter.

B) The Presidium's First Draft Preamble (Convent 43)

Since the presidium's document set the stage for the ensuing debate and subsequent proposals, it is worthwhile looking at Convent 43 in some detail. The first sentence, which was to become subject to numerous alterations, read: "The peoples of Europe have established an ever closer union between them and henceforth share the same destiny". The next sentence then enumerates the 'indivisible, universal principles' on which the Union is founded. Interestingly, these are already an expansion of the principles listed in Article 6 of the TEU (freedom, democracy, respect for human rights and fundamental freedoms and the rule of law) to include also 'the dignity of the human being', 'the equality of all persons, both men and women, and solidarity'. While there had been considerable debate before on the possible role of a non-justiciable concept like 'solidarity', its introduction as a founding principle of the Union here did not raise substantial objections.

The third paragraph establishes an important role for the Union because it states "The Union *contributes to the development* of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member states (...)" (emphasis added). This formula reflects the 'activist' terminology of the Cologne mandate which had spoken not only about *respect* for, but also *protection* of human and fundamental rights. While it is not legally tangible what exactly constitutes a 'contribution' to the development of 'values', it is clear that such a wording goes beyond the formula 'recognises and respects' that is used in certain Charter articles in areas where it was argued that the Union had (as yet) no competencies to 'guarantee' the rights in question (most controversially in Art. 34, access to social security, and Art. 36, access to services of general economic interest).

The wording "(...) the cultures and traditions of the peoples of Europe as well as the national identities of the Member States (...)" is also an interesting deviation from the existing Treaty language: while the Treaties speak of the "national identities of the member states" (Art. 6.3) and "the cultures of the Member States, while respecting their [the member states'] national and regional diversity" (Art. 151), the draft preamble of the Charter assigns cultures not only to (nation) states, but also to 'peoples'. This sentence alerts to the intrinsic contradiction which shapes much of the debate about the Union's legitimacy, namely between the alleged 'commonality' of

[30] Vienna Convention on the Law of Treaties between States, 23. May 1969, UN Doc A/Conf39/28 [emphasis added].

the underlying values and the 'diversity' of cultures and traditions deemed worthy of protection. Yet, as Richard Bellamy argues, "(...) the Union's simultaneous respect for both "fundamental rights" (Treaty of Amsterdam, TA F2) and "the national identities of its member states" (TA F3) is assumed not to create tensions (...) [b]ecause the liberal cosmopolitan principles of "liberty, democracy, respect for human rights and fundamental freedoms and the rule of law"" are "principles which are common to the member states" (TA F1).[31] Thus, if any conflicts arise, the same principles should provide a framework of 'agreed norms and procedures' within which to resolve them.[32] The debates about these principles in the Charter Convention was the first opportunity to actually test how effective these conflict resolution procedures really are at the EU level.

Paragraph four of the presidium's draft preamble reiterates the main objective of the Cologne mandate by stating "[t]he protection of fundamental rights in the Union and their visibility to all require that they be anchored in a charter of fundamental rights of the European Union", while the following paragraph recapitulates the Cologne list of sources of fundamental rights in Europe. Significantly the draft preamble omits from this lists the "(...) rights flowing from Union citizenship", but does mention explicitly the "(...) jurisprudence of the Court of Justice of the European Communities and of the European Court of Human Rights". This latter inclusion is an attempt to ensure a prominent place for changes to the 1950s ECHR stemming from the Court's case law, because several observers and Convention members had frequently warned against the danger of inconsistencies emerging between the Charter and the European Convention.[33]

Paragraph six of the proposed preamble is an unusual 'statement of mission' for a document of this kind because it reads: "If [the Charter] *adapts* the content and the scope of these rights to the development of society, to social progress and to scientific and technological development.' (emphasis added). Such an open recognition of the relativity of the rights in question to time and circumstances seems to be at odds with the 'traditional' rhetoric of timelessness and universality often associated with fundamental human rights.[34] Similarly to the reference to the jurisprudence of the European Court of Human Rights, the wording suggests a dynamic concept of rights as part of an ongoing development. The next paragraph (seven), however, goes back to a very traditional approach to rights stating that "[e]njoyment of these rights entails responsibilities and duties with regard both to other persons and to the

---

[31] Richard Bellamy: "Citizenship beyond the nation state: the case of Europe", in Noel O'Sullivan (ed.): *Political Theory in Transition* (London: Routledge 2000), pp. 91-112, at p. 99.
[32] *Ibid*.
[33] Mark Fischbach (observer in the Convention for the Strassbourg court): Document CONTRIB 4411/00, 13.07.2000.
[34] Peter Jones: *Rights – Issues in Political Theory* (Basingstoke: Macmillan 1994).

human community". This understanding of fundamental rights (voiced mainly by Christian democrat Convention members Mombaur and Friedrich) as part of a system of 'moral' entitlements and obligations is, in Jürgen Habermas' assessment, an expression of a pre-modern concept of legal order which is extremely problematic to sustain in the discourse about supposedly 'universal' human rights in a multi-cultural world.[35] Not surprisingly, it were the same two members of the Convention who were most outspoken in favour of a reference to the 'Christian' or at least 'religious' heritage of the Union that showed so clearly the limits of the common understanding of European values.

The last paragraph of the presidium's first attempt at a preamble text restates the limitations to the scope of the Charter ('no new competencies for the Union') as they are already formulated as articles proper among the horizontal provisions (Art. 51 of the final draft), and reaffirms the principle of subsidiarity. It is important to notice here the provision that "(...) the institutions of the Union and the Member states will guarantee, with regard to every person, the following rights and freedoms (...)" because this blanket *guarantee* was later replaced by a mere 'recognition'.

C) The Draft Preamble Before the Convention

This first presidium draft for a preamble already contained all the elements that would finally shape the Charter's prologue, and it set the format for most of the alternative suggestions tabled subsequently. Nevertheless the wording itself was changed considerably in the process of three re-drafts by the presidium and several lively debates. The first of these debates took place on July 19 and it was further animated by one of the most important alternative proposals in reaction to the presidium's draft, that by the British Prime Minister's representative Lord Peter Goldsmith.[36] This draft contained a number of surprising proposals which showed how debate and compromise influenced each other and the Convention members.

For instance, Goldsmith's draft significantly elevated the 'four freedoms enshrined in the Treaties' (freedom of movement for goods, persons, services and capital), to the status of fundamental rights (paragraph 2). The presidium took up this idea and included the freedoms in later drafts albeit not explicitly as fundamental rights but rather as 'aims' of the Union. With regard to the overall function of the Charter, Goldsmith's paragraph 3, not surprisingly, is more restrained by stressing that "the Union is (...) obliged to respect fundamental rights as guaranteed by the ECHR and as they

[35] Jürgen Habermas: *The Inclusion of the Other* (Cambridge: MIT Press 1998).
[36] Lord Peter Goldsmith: "Proposed Preamble", informally circulated in the Convention on 18.07.2000, formally published as CONTRIB 283 on 20.07.2000.

result from the constitutional traditions common to the Member States (...)" rather than "contributing to the development of any values" (presidum text).

Another interesting suggestion is contained in Goldsmith's paragraph 5 which states that "(a)ll fundamental rights of the individual flow from the dignity of the person (...)". This prominent role for the concept of human dignity, which Goldsmith had earlier on dismissed as non justiciable and therefore detrimental to the aim of legal certainty if formulated as an article in itself,[37] must be seen as a reverence to Roman Herzog and his close association with the first article of the German Basic Law which proclaims the 'inviolability of human dignity'.

The greatest surprise of the Goldsmith proposal comes, however, in its paragraph 7 where Goldsmith accepts that "(t)he Union recognises that, in addition to fundamental rights and freedoms, there are certain *principles*, especially in the field of social protection, which are common to all member states" (emphasis added). Together with the limitation in the following sentence that "(t)hese [principles] are recognised in each Member State to the extent and in accordance with limitations appropriate in each Member State (...); and the principle of subsidiarity". This provision looks on the one hand like a straightforward attempt to limit the potential scope of any social provisions by distinguishing them from justiciable rights and by emphasising the overarching limitation of 'subsidiarity'.[38]

On the other hand, Goldsmith's preamble of July 2000 is a good example of how debates and interaction within the Convention changed individuals' views, and allowed for common discursive positions to be constructed. Goldsmith had insisted during preceding debates on social rights that 'objectives' of policy (as opposed to genuine, existing rights) had no place in the Charter at all.[39] Goldsmith's recognition, in the draft preamble, that "(...) there are certain principles, especially in the field of social protection (...)", is therefore an important softening of his position. In particular, as Goldsmith even imposes an obligation on the member states to "(...) have due regard to those [common] principles (...)" in the next paragraph of his draft preamble.

This change in approach can partly be explained by the necessity to stem more ambitious demands to formulate the social provisions as genuine rights. At the same time it seems justified to infer from the correlation between the debates in the Convention and the subsequent statements that persuasion played a part in the change of Goldsmith's stance. Certainly one of his main interlocutors (and opponents) on these issues pointed in this

[37] Lord Peter Goldsmith: Convention Debate 24.2.2000.
[38] 'Subsidiarity' is one of the most widely contested concepts in the European discourse, see for example Thomas Diez: "Speaking Europe: the Politics of Integration Discourse", *Journal of European Public Policy*, 6 (1999) (Special Issue), pp. 598–613, and is now discussed in a special working group of the Convention 2002.
[39] Lord Peter Goldsmith: Convention Debate 03.04.00.

direction: When asked with whom he personally worked most closely, Guy Braibant, representative of the French government, answered on June 30th, briefly before the preamble drafts were tabled: "With several people (...) with Lord Goldsmith, who is a bit of an adversary (...) I work a lot with him, we complement each other and (...) step by step we convince each other, (...), each of us has taken a step towards the other. There are also personal sympathies, which can help."

Thus the examination of the Goldsmith draft preamble shows how ideas put forward by the presidium were taken up by Convention members and shaped by the debate. Other draft preambles took different approaches and interesting projects of collaboration emerged. Piero Melograni for instance, Forza Italia representative of the Italian Chamber of Deputies and professor of history, and Peter Mombaur, German Christian Democrat MEP and former constitutional court judge, submitted a joint proposal. They put strong emphasis on the historical context of the Charter as a constitutional document and took issue with the idea of a 'shared destiny' of the peoples of Europe introduced by the presidium. On 19th July, Mombaur argued that the first sentence in the presidium's draft mixed up the sequence of events (in a temporal and a causal sense) because 'They' [the peoples of Europe] did not have the same destiny *because* they created a Union, but the other way around. In his own proposal with Melograni, the first line consequently read "The European peoples share common challenges. *For this reason* they have created an ever closer Union between them".[40]

This debate about the account which the Union should give of itself in the preamble is exemplary of the struggle for a consistent 'narrative' of European integration in the Convention. Such a narrative is one of the basic elements of most concepts of collective identity,[41] and thus a more coherent portrayal of the reasons for, and development of integration could form part of an answer to the Union's legitimacy problems.[42] It is significant here that both the Mombaur/Melograni and the presidium's proposed formula portray the 'European peoples' as the ultimate actors, as opposed to the 'high contracting parties' which are the subject of the preambles to the European founding treaties. In this the Charter debates clearly mark a shift towards a more self-assured discourse of the EU about itself as independent of the member states.

Similarly, both draft preambles for the Charter echo the formula of the EEC Treaty's 'ever-closer union'. In this context, the choice of tense in the presidium's draft ("(...) have established (...)") is particularly significant because it is in stark contrast with the Cologne mandate which speaks of "the

[40] Emphasis added.
[41] Ruth Wodak, Rudolf de Cillia, Martin Reisigl, and Karin Liebhart: The *Discursive Construction of National Identity* (Edinburgh: Edinburgh University Press 1999).
[42] Lord and Beetham, *supra,* fn. 9.

present stage of the Union's development" and thus suggests an ongoing as opposed to an accomplished process. This was noted in a written comment by Daniel Tarschys, representative of the Swedish government and generally critical member of the Convention, who noted that "[t]here are several stylistic problems. One concerns time, tenses, and the order of events: the Union has been established in the past, the progress towards 'ever closer Union' is an ongoing process, the destiny is shared 'henceforth'; this becomes a bit confusing".[43]

The presidium reacted to this and other criticisms by changing the formula concerning the common destiny, but not the reference to the 'peoples' of Europe (see below). It has to be remembered here that the five members of the presidium, in drafting the Charter texts, were nominally independent from the other Union institutions, and their relationship to the Convention as a whole was not clearly defined. The presidium held its meetings behind closed doors and the way in which it 'took account' of the debates in the Convention was not always transparent.[44] This in fact is one of the most important limitations to the generally positive evaluation of the Convention as a 'deliberative setting'. In fact, it is not clear which methods of decision making were at work within the presidium when it reacted to the work of the Convention plenary.[45]

D) The Second Round of Drafts and Debate

The second draft preamble dates from July 28th and forms part of the first full draft of the Charter (Convent 45), tabled just before the summer recess of the Convention. Comments and proposals for amendments were invited by September 1st. The preamble had undergone substantial change by this stage: gone was the 'shared destiny henceforth'. Instead the peoples of Europe were credited with another act of will, namely the fact that they "(...) are *resolved* to share a *peaceful future* based on *common values*' (my emphasis). This is an interesting twist on the previous version because it introduced the notion of 'common values' in the first sentence even before the 'universal principles' which appear in the second paragraph. This change came probably in response to the debate on July 19th when Mombaur, Meyer, Lallumiere and Altmaier had argued explicitly for the idea of a 'community of values'. But while these suggestions seem to have directly impacted upon the presidium's consecutive drafts, other issues raised by several speakers in the same debate did not lead to substantial change, thus casting doubt on the presidium's arbitration in taking up or ignoring opinions expressed in the plenary.

---

[43] Daniel Tarschys: "Observations on the Draft Preamble presented by the Presidium", 19.7.2000.
[44] Leinen and Schönlau, *supra*, fn. 13.
[45] See below.

For example there was further debate about the 'authorship' of European integration and the question who or what were to be its subjects, when it became clear that the new draft was unchanged on this issue: Jo Leinen (MEP, PSE) for example proposed an opening statement addressing the 'people' rather than 'peoples' of Europe (German: *Menschen* rather than *Völker*), while Gabriel Cisneros (conservative representative of the Spanish Congress) suggested that the preamble should take account of the role of the nation state in the construction of the Union and should thus refer to the 'citizens of the member states'. Andrew Duff (MEP, ELDR) argued that one of the distinguishing features of the Union was the fact that power flows from *both* the states *and* the peoples and that this should be reflected in the preamble. Moreover he warned against the tendency of the EU and its member states of monopolising the concept of 'Europe' for themselves and therefore proposed to start: "The peoples of the European Union and its Member States have (...)". Others wanted to drop the first paragraph altogether (Daniel Tarschys, Willie Brauneder). Johannes Voggenhuber even accused the presidium of trying to write ideology-driven attitudes towards inter-governmental integration into stone by choosing the words of its draft.

Despite these and other interventions in favour of changing the opening phrase of the preamble, the following drafts up to the final version (Convent 47 of September 14th and Convent 50 of September 28th) all left the reference to the 'peoples of Europe' unchanged. The presidium's drafting practice with its reluctance to call votes meant that it was impossible to ascertain whether a majority of Convention members was in favour of the proposal or would have opted for change. While this practice was justified by a member of the presidium by claiming that votes would have deepened the divisions within the Convention[46] and thus decreased deliberation, it is possible that the presidium here consciously ignored the majority of Convention members because of real, or expected, external pressures. A substantial part of the more than 30 speakers who intervened in the preamble debate argued strongly for change and it seems doubtful whether the silence of the majority could be interpreted as support for the proposal put before them.

E) The Finale – the Controversy about Europe's 'Religious Heritage'

The opening sentence was subsequently only changed marginally (Convent 47 of September 14th) to "[t]he peoples of Europe, in developing an ever closer union between them, are resolved to share a peaceful future based on common values" and substantially remains like this in the final version of the Charter. The second paragraph, reiterating the principles of article 6 TEU with the important addition of 'solidarity', had been left largely unchanged in

[46] Interview with Iñigo Méndez de Vigo (member of the Presidium), 11.10.2000.

the second draft, but saw the most controversial change in Convent 47 of 14.09.00: in an attempt to give substance to the values invoked in the first paragraph, Convent 47 reads: "Taking inspiration from its cultural, humanist and religious heritage, the Union is founded on (...)". This reference to the 'religious' heritage of the Union provoked outrage among several members of the Convention, most notably from most of the French and some Italian Socialist representatives. The ensuing controversy reveals how the deliberative elements of the debates in the Convention were increasingly mixed with, and eventually gave way to, more traditional ways of international diplomacy and horse-trading as the deadline for producing a Charter approached.

Before we turn to this debate, however, it is important to notice that the second paragraph now also includes references to the union citizenship and to the programmatic notion that "[the Union] places the individual at the heart of its activities (...)". While this latter change represents a rather important statement in terms of value-choice for a collectivity like the EU, it was hardly noticed in the frenzy about the 'religious heritage' that took centre stage in the final phase of the negotiations. Whether deliberately or genuinely due to time pressure, the mechanisms of the deliberative process to generate debate seem to have failed on this issue.

In assessing the impact and conduct of the final stage of debates, an important fact has to be noted: the presidium had decided already before the summer recess to hold the last meetings before the final general debate (Sept. 25/26) in the 'delegations'[47] rather than in the Convention plenary. The reasoning behind this approach was apparently a particular interpretation given to the provisions of the Tampere rules for adopting the draft Charter which stipulated that a draft should be forwarded to the Council "(w)hen the chairperson...deems that the text of the draft Charter...can eventually be subscribed to by *all the parties* (...)". The presidium took this to mean that the four constituent delegations had to accept the draft rather than all 62 individual Convention members.[48] This arrangement is significant because the clash about the role of 'religion' as a founding element of Europe's value order thus took place within the institutionally pre-defined groups and was then channelled through, and 'mediated' by, the chairpersons of these delegations in the presidium.[49]

The struggle over the religious reference in the preamble therefore reveals clearer than any other example the limits of the 'classical' method of both party-based parliamentary debate (in the EP Delegation) and international negotiation (in the national government representative

[47] Delegations of national Parliament representatives, national government representatives and European Parliamentarians, and the two-persons representing the Commission respectively
[48] Interview with Jean Paul Jacqué, Secretary General of the Convention, 13.04.2000.
[49] The following account is largely based on the author's participant observation in the debates in the European Parliament Delegation and the groups of European Socialists.

delegation), and the potential (in this particular case only partially explored) of the deliberation in the multi-dimensional plenary body of the Convention: tensions rose very high on this issue, especially in the European Parliament delegation and among some national representatives. The French government representative apparently threatened to block any draft Charter which included the word 'religion' in the preamble. Thus on this particular point the 'compromise' was forced by moving not just from 'persuasion/deliberation' to 'diplomatic bargaining', but even to a kind of 'coercion'.

F) The Debate Within the Delegations – Last Minute Horse-trading

In the EP Delegation, with the corrective element of the Convention plenary and the ensuing incentive for institutional cohesion removed, the debate on the inclusion of a reference to the 'religious heritage' turned into an ideological battle between Christian Democrats and laicist Social Democrats/ Greens. There were heated exchanges in the debate on September 12th (already based on Convent 47), admittedly not only on the question of the preamble. The problems were exacerbated by time pressure and the insistence of the delegation's president Iñigo Méndez de Vigo (EPP) that the EP delegation could not ask for too many changes to the draft at this late stage. In fact, the constructive atmosphere of the Convention as a whole seemed to have evaporated when one member of the delegation, Johannes Voggenhuber, accused the president of the delegation of ignoring a 'clear majority' in favour of substantial changes within the delegation. He even challenged the legitimacy of the entire process by claiming that the Convention had become a "(...) means for the national governments to write the Charter for themselves".[50]

Inter-delegation shuttle diplomacy went on at the same time, and also the party groups (mostly within the EP Delegation, but with the inclusion of members from other delegations) played an important role in co-ordinating positions and in trying to put pressure on the presidium for late changes. In a clear sign that at this stage (September 12th) the exchange of argument on the substantive merits of particular elements of the preamble had been replaced by a politicised bargain to reach some kind of compromise, Mendez de Vigo proposed a 'package deal' to the EP delegation. This 'package' included the preservation of the formula 'cultural, humanistic and religious heritage' in the preamble and no further limitations to Articles 15–17 on freedom to chose an occupation and to own property. These propositions, meeting demands from the right, were 'traded off' against the inclusion of a right to strike in Article 26 and stronger provisions for consumer protection in Article 35 as demanded by the left.

[50] Johannes Voggenhuber: interview 10.10.2000.

Since the EP delegation president followed the presidium's overall practice of not taking votes in the delegation, he offered the package as a 'take-it-or-leave-it option – on which occasion at least two members of the 16 strong delegation did not support it (Kaufmann/Voggenhuber). Interestingly from a procedural point, the debate was then taken to the political groups in preparation for the next meeting of the EP Delegation, further underlining the politicisation of the debate in this 'political end-game'.[51]

Meanwhile the presidium tabled its new compromise. This new proposal (Convent 48) 'solved' the problem of the reference to the European heritage by replacing the word '*religieuse*' in the French draft with the less controversial '*spirituelle*'. Despite the fact that several members of the European Parliament delegation from both sides of the debate were still unhappy with the second paragraph,[52] the new formula seems to have taken the sting out of this particular debate. In this situation the contemporary change of the 'cultural' heritage which became the 'moral' heritage, went largely unnoticed. In an interesting aside, three Christian-Democratic members of the EP delegation (Friedrich, Mombaur, and van Dam) argued that it was possible to have slightly differing translations of the French '*spirituelle*' in other languages and insisted that the German and Dutch versions should read '*geistig-religiös*', thus bringing back in the religious reference. The two German members managed to obtain a confirmation of this translation from Roman Herzog, (also a member of the Christian Social Union) who was in hospital at the time, and consequently the German version of the Charter now differs by one significant word from the other translations.

Other parts of the preamble were also changed again between the 14th and 25th of September, and it is not clear how much these changes were debated and in which fora. Apart from some linguistic adjustments, the more important changes concern the wording on 'human dignity, freedom, equality and solidarity': while they had been referred to as 'principles' in the old drafts (thus echoing the formula of Art. 6 of the TEU), they now became 'values' in themselves, whereas the term 'principles' was reserved for 'democracy and the rule of law'. This was in line with the overall tendency to raise the level of rhetoric in the preamble and draws a clearer distinction between the founding values underlying (and legitimising) the EU's creation, and the 'principles' which inform its operation.[53]

---

[51] There are interesting parallels here between the debates in the Charter Convention and Jeffrey T. Checkel's account of debates in the Council of Europe 'Expert Committee on Nationality', see Jeffrey T. Checkel: "Building New Identities? Debating Fundamental Rights in European Institutions" (Oslo: ARENA 2000), Working Paper No. 00/12.

[52] Elena Paciotti/Catherine Lalumiere/Ingo Friedrich/Peter Michael Mombaur in EP Delegation debate on 21.09.2000.

[53] Daniel Tarschys, however, observed on this formula that "(...) the notion of *indivisible* values might sound good, but it does not make much sense logically". Daniel Tarschys, chapter 8 of this volume.

The explanation of the 'purpose' of an EU Charter in addition to the existing systems of fundamental rights protection, also changed once more: "*To this end* [namely to contribute to the development of the above mentioned values while respecting diversity, and to promote balanced and sustainable development and to ensure the four freedoms], it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter".[54] This formula again stresses the instrumental role of fundamental rights in furthering the end of 'preserving and developing' the values mentioned in the preceding paragraph.

Finally, the very last sentence of the preamble was changed to the more readable "(t)he Union therefore recognises the rights, freedoms and principles set out hereafter". This formula takes up the idea of 'principles' being included among the rights and freedoms of the Charter (with their legal status presumably to be determined by the courts), but avoids the difficult question of whether these rights are recognised for every human being, every person (a distinction that was of importance in the debate about Art 3, the right to life), or just every EU citizen or EU resident. At the same time it has to be remembered that the 'recognition' of rights was a deliberate step back from the earlier drafts which spoke of a guarantee for these rights and had been criticised for suggesting EU competencies beyond the current state of affairs.

IV. Conclusion: The Charter's Preamble as the Benchmark of Europe's Ongoing Value Discourse

This reconstruction of the debates about the Charter's preamble gives a useful insight both into the internal dynamics of the Convention at work, and into the trappings and intricacies of the value discourse at the European level. The exercise to define what and whom European integration 'is all about' has been a challenge within the integration process for a long time.[55] The process of drafting the EU Charter of Fundamental Rights was the first step in the latest round of institutional attempts to address these issues, and it prepared the ground for the current broader debate about a European constitutional treaty.

With regard to the Convention method, the Charter process provides some important lessons. The exchange of arguments in the particular setting

[54] Emphasis added.

[55] See literature about concepts of a 'European identity' and the debate on the 'finalité' of the EU triggered by German Foreign Minister Joschka Fischer (12.05.00) and reflected in the Laeken declaration on the 'Future of the EU' (European Council "The Future of the European Union", Annex to the Conclusion of the Laeken summit, 8./9.12.2001).

of the Convention, displaying significant elements of a deliberative process (relative transparency, fluid cleavage structure, open debates) was the closest the EU had got up to then to a 'constitutional' debate on the value question.[56] The Charter process was the attempt by the European Union to specify the norms and values (as well as their legal corollaries) which underlie European integration, in order to sustain a 'post-national' legitimacy,[57] through a deliberative process.

Given the role of the preamble as 'explanation' of the subsequent legal text which provides the context for its interpretation, the case study has attempted to draw attention to the way in which issues of value and identity were crystallised in the preamble debates and how the deliberative nature of the process contributed to the broadening of a common understanding of these issues among different European integration actors. It shows that at a general level a number of substantial 'values' (i.e. the ones mentioned in Article 6 of the Treaty) were recognised by all actors as being important from the outset.[58] In the the Convention, agreement was reached that the formulation of the underlying (universal) values listed in article 6 was too narrow and thus the Convention agreed on expanding this set of values to include also the concepts of 'solidarity', 'equality', and 'human dignity'. Even more significantly, the diverse actors united in the Convention also agreed that the European Union has a role in 'developing' these values.

At the same time, however, the more concrete specifications of what these values are and how the proposed 'contribution' to their 'development' can be understood politically (for example on the question of the common value of solidarity and a concrete commitment to social policy through social entitlements) showed profound rifts both between different member states and, expectedly, between political families. Moreover, the controversy over the 'religious' cultural heritage clearly revealed the limits of agreement on references to an allegedly common past in the European value discourse.

The 'solution' to avoid problems by 'fudging' the issue and using '*spiritual*' rather than '*religious*' and then allowing the German version of the Charter to re-introduce the notion of a religious heritage, seems typical of a European Union which is in an ongoing process of 'permanent revolution'.[59] Of course it could be argued that the vagueness of the formula merely papers over underlying differences and thus pre-empts a more thorough deliberation which would lead to genuine compromise on how to define Europe's heritage. On the other hand, it can be seen as a subtle way of marking where the fault line between 'commonness' and 'diversity' runs at this moment in

[56] Jo Shaw: "Process and Constitutional Discourse in the European Union", *Journal of Law and Society*, 27 (2000), pp. 4–37.
[57] Eriksen and Fossum, *supra*, fn. 5, at p. 24.
[58] John E. Fossum: "Identity Politics in the European Union", *European Integration*, 23 (2001), pp. 373–406.
[59] Eriksen and Fossum, *supra*, fn. 5, at p. 22.

time. Provided that the Charter is understood truly as the starting point of constitutional process rather than its end result (and thus remains open to future change),[60] the word 'spiritual' might in due course be replaced by some other expression that represents a fuller and more 'common' understanding of Europe's self-consciousness.

With regards to the Convention method, the account given above indicates that approximation was enabled in this particular (relatively small, elitist) setting on a number of elements of the value question among very different views. Several of the Convention members interviewed indicated that they felt a genuine dialogue had helped to build a common understanding that did not exist prior to the Convention.[61] Not surprisingly, this was easier on those parts of what is 'European' which were linked to the already 'common' history of an integrated Europe (like the protection of fundamental rights as a general principle or the values of Article 6). But even the agreement found on the issue of Europe's spiritual heritage, while certainly not persuading everybody, proved a successful way to overcome ideological deadlock which frequently has blocked the development of a common European understanding on other occasions.

Finally the account of the sequential development of drafts for, and debates about the preamble, throws some light onto the different dynamics which were at work in the Convention and the impact of different settings for debate on the end result. The early stages of the discussion, up until the summer recess of the Convention were characterised by open debate and exchange of views in the Convention plenary. Under these circumstances, the Convention was quite close to a 'deliberative setting' in Jon Elster's terms.[62] He notes that the conditions for deliberation are defined by four core variables, namely the size, the publicity of the assembly, the absence or presence of force, and of strong individual or sectorial interests.[63]

It is also clear, however, that there are trade-offs between and within the four variables. If an assembly is too small, for example, it does not provide enough space for exchange, but at the same time debate in large assemblies "(...) tends to be dominated by a small number of skilled and charismatic speakers".[64] Similarly, publicity is a double edged sword because on the one hand, it allows delegates to be persuaded without loss of face, but it also limits their need to 'soften' interest-based positions by common-good arguments.[65] In this sense, the Charter Convention with its about 120 members seems to have had the right size to allow for a feeling of belonging

[60] Jo Leinen and Justus Schönlau: "Die Erarbeitung der EU Grundrechtecharta im Konvent: nützliche Erfahrungen für die Zukunft Europas", *Integration*, 24 (2001), pp. 26–33.
[61] For example Caspar Einem: interview 18.07.00; Michiel Pateijn: interview 18.07.00.
[62] Elster, *supra*, fn. 18.
[63] *Ibid*. p. 100.
[64] *Ibid*. p. 109.
[65] *Ibid*. p. 110.

to emerge, while providing a large enough arena to encourage public deliberation. In comparison, the 2002 Convention with 105 members and 105 'suppleants' is already so large that the real work is more likely to be done in the working groups of 20–30 members.

In the concrete case of the Charter debates, it is clear that the debates after the summer recess which were held in the institutionally defined 'delegations' were marked by a politicisation of the exchanges which encouraged bargaining between nationally and/or ideologically pre-defined interests rather than deliberation. Thus while the closure of the debates in the delegation and the smaller size of the setting should have increased the likelihood of deliberation, this and any effect of a developing 'common actor identity' were offset by the 'politicised end game',[66] at least in European Parliament delegation. This further supports the observation that a high degree of politicisation adversely affects the 'deliberativeness' of the debates. This is borne out by the first six months of the Convention Mark II, which from the outset had to contend with a much higher public and especially political visibility than the Charter Convention. This led to criticisms of an over-cautious attitude of the leadership of the new Convention.[67] It is hardly possible to fully disentangle the complex set of forces which influences the final outcome of such debates. These pressures are, however, part of any real-life political dialogue and thus need to be accepted and taken into account.[68]

The Convention method as a combination of representative elements and deliberative methodology brings these pressures into the open and is therefore an important addition to the EU's political tool kit. With the inclusion (albeit limited)[69] of civil society actors, and the attempt to make the debate accessible for a broader public,[70] the Charter case represents a reasonably successful test-run for negotiations in a complex, multi-cultural setting. The Charter and its process made unmistakably clear that the European Union is a polity based on a distinct set of universal values and with an increasingly distinct set of tools for their realisation. The second Convention is facing a much more difficult task because of the enormity of its remit (basically every aspect of European integration is under consideration) and the ensuing pressures. Yet the Convention setting is the best attempt yet to provide an arena for an open and deliberative exchange to address these issues.

---

[66] Checkel, *supra*, fn. 51.

[67] Agence Europe, 13.05.2002; Financial Times Deutschland: "Heftiger Streit um EU-Verfassung", 14.06.2002.

[68] Elster, *supra*, fn. 18, at p. 9.

[69] Olivier de Schutter: "La 'Convention': un instrument au service de l'art de gouverner dans l'Union européenne?", paper at ARENA Workshop "The Charter of Rights as a Constitution-Making Vehicle", Oslo, 8–9 June 2001.

[70] It is significant that on the preamble itself there was apparently little, if any, input from the broader public, either via the Convention web-site or in direct contributions to individual Convention members.

Chapter 7

Civil Society in the Constitution for Europe[1]

Olivier De Schutter

Three recent developments have caused a renewed interest in the identification of a 'civil society' at the European level, and in the methods by which to improve its participation in the institutional system. First, the consolidation of movements critical towards the present shape of globalisation was both made possible by, and in turn favoured, the emergence of a trans-national network of organisations. These organisations have widely varying degrees of formalisation and modes of intervention. But they gather around a small number of common themes, one of which is their opposition to the pursuit of the project of economic liberalization in Europe, as long as such liberalization – often equated, at the rhetorical level, with privatisation of traditionally public sectors – is not counterbalanced by progress in the social field and by the democratisation of the decision-making process in the European Union. Many feel that this 'new actor' should be better integrated in the institutional system of the Union if the dialogue with it is to lose its purely confrontational dimension. Many feel that the legitimacy of the European Union, in the years to come, will depend on its capacity to include these critical voices, and to offer convincing answers to the questions raised by these organisations. The decentralised approach typical of the open method of co-ordination in the employment and social policies, which purports to involve a number of new actors – including the social partners and civil society – may be seen as a first, still timid, move in that direction.[2]

Second, there is the experience of the drafting of the Charter of Fundamental Rights of the European Union. This process, which took place between December 1999 and October 2000, has raised considerable interest within the most diverse organisations of civil society.[3] Partly because of the simplicity of the issues raised by the drafting of a Charter of rights – simple, at least, in the symbolic stakes of such an exercise – partly because of the

---

[1] Adapted and updated from "Europe in Search of its Civil Society", *European Law Journal*, 8 (2002), pp. 198–217. We thank Blackwell Publishing for the permission to use previously published material.

[2] See, e.g., Knut-Johan Lönnroth: "The European Employment Strategy, a Model for Open Co-ordination: The Role of the Social Partners", presented at the Saltsa Workshop "Legal Dimensions of the European Employment Strategy", Brussels, 9-10 October 2000. This point is developed below, in part I.C). The ambiguity inherent in the favouring of a stronger implication of civil society actors in the European Employment Strategy or in the open method of coordination as it has been put in place to combat social exclusion and poverty is striking, if we take into account the paradigm – of 'activation of the Welfare State' – which dominates these policies coordinated at the level of the Union. It is a point I return on later.

[3] See esp. Gráinne de Burca: "The Drafting of the EU Charter of Fundamental Rights", *European Law Review*, 26 (2001), pp. 126–139, at p. 126.

unprecedented openness of the Convention –which invited outside contributions, placed them on the website of the Convention, and held a hearing of 67 non-governmental organisations on April 27, 2000– the drafting process led to an authentically European-wide debate among the organisations of civil society. The general impression was that the drafting process of the Charter compared favourably with the classical intergovernmental negotiations preceding constitutional changes in the European Union, even when such intergovernmental conferences are prepared by 'reflection groups', as was the case of the Westendorp group in charge of identifying the issues to be decided in the Treaty of Amsterdam of 1997[4]. It is of course this model which was followed by the Laeken Convention on the Future of Europe. The "deeper and wider debate about the future of the European Union" called for by the Declaration on the Future of the Union adopted by the European Council in Nice in December 2000 already envisaged "wide-ranging discussions with all interested parties", including the "representatives of civil society"; and the Memorandum of the Benelux countries on the Future of Europe, released on June 20, 2001, anticipated that the Forum which – "in contact with the ongoing and simultaneous public debate" – should prepare the next IGC would take 'contacts' with civil society, very much in the fashion such contacts were so usefully made in the drafting process of the Charter of Fundamental Rights.[5] Indeed, parallel to the Convention convened on 28 February 2002, the Forum of Civil Society was instituted. A specific web site was created to that effect. On 24–25 June 2002, the Convention devoted its plenary meeting to hearing representatives of civil society. Civil society organisations structured themselves to form the Civil Society Contact Group, with the intent of facilitating a regular consultation of civil society through the work of the Forum.[6] Although they still remain less ambitious than some proposals made

[4] See, on this experience, Gráinne de Burca: "The Quest for Legitimacy in the European Union", *Modern Law Review*, 59 (1996), pp. 349–376, at p. 349. Bruno de Witte analyses in detail the evolution in the practice of intergovernmental conferences with respect to openness and transparency: "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process", in Paul Beaumont, Carol Lyons, and Neil Walker (eds.): *Convergence and Divergence in European Public Law* (Oxford: Hart 2002), pp. 39–57, esp. at pp. 52–57.

[5] The Memorandum reads in the relevant part: "The Forum will consist of the representatives of national parliaments, the European Parliament, the European Commission and the governments of the Member States. The candidate countries can also contribute to the work according to arrangements to be decided. The President may take initiatives for consulting the regions. He will also be responsible for contacts with civil society" (http://europa.eu.int/futurum/documents/ other/oth200601_en.htm).

[6] The Civil Society Contact Group, which intends "to promote the involvement of civil society within the work of the Convention and the accompanying Forum", comprises "representatives of the main representative sectoral European NGO networks (environmental, social, human rights and development) together with the European Trade Union Confederation". See the letter addressed on 14 February 2002 to Mr. Valéry Giscard d'Estaing, the President of the Convention, by the Civil Society Contact Group.

by legal scholars,[7] all these mechanisms seek to improve on the experience of the drafting of the Charter of Fundamental Rights. The goal is to ensure a more satisfactory involvement of these new actors on the European scene.[8]

Third, (and one could say, finally), there exists a rather vague but widely diffused impression that the legitimacy of the European process of integration must now be more process-based, rather than result-based. Output-legitimacy must now be complemented by input-legitimacy[9]. This is so given that the initial project of building solidarity among the peoples of Europe by the creation of a single market has exhausted its appeal. Improving the participation of the organisations of civil society is considered an element of this search for legitimacy. Thus, the *White Paper on European Governance*, rendered public by the Commission on 25 July 2001 takes a positive view on the contribution of the non-governmental organisations to the definition and implementation of European policies. In that paper, we can read that NGOs "often act as an early warning system for the direction of political debate", and that their involvement "offers a real potential to broaden the debate on Europe's role. It is a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest".[10] This emphasis on openness[11] and participation in the *White Paper on European Governance* of the European Commission is simply one indication among others of a desire to launch new modes of collaboration between the institutions of the European Union and the non-governmental organisations. This is to be done for the sake of both a better effectiveness of European policies and for their improved legitimacy.[12]

Thus, the calls for a stronger contribution of civil society – mostly labelled 'organised civil society', as in Article 257 TEC as revised by the Nice Treaty[13] – concern both the constitutional process in the European

---

[7] See esp. Deirdre Curtin: "Civil Society and the European Union: Opening Spaces for Deliberative Democracy?", *Collected Courses of the Academy of European Law*, 7 (1999), 185–280, p. 185.

[8] See the Note of 13 March 2002 from the Secretariat to the Convention, on "The Convention and Civil Society" (CONV 48/02).

[9] On this distinction, Fritz W. Scharpf: *Regieren in Europa* (Frankfurt am Main: Campus 1999); and Fritz W. Scharpf: "Democratic policy in Europe", *European Law Journal*, 2 (1996), pp. 136–155, at p. 136

[10] COM(2001) 428 final, 25.7.2001. See esp. the comments on "Better involvement", as part of the "Proposals for change" contained in the communication (point 3.2.).

[11] 'Openness' and 'participation' are listed among the five principles of 'good governance' by the *White Paper* of July 2001. The other three principles are 'accountability', 'efficiency', and 'coherence'. See pp. 10–11.

[12] See esp. the Commission discussion paper: "The Commission and Non-Governmental Organisations: Building a Stronger Partnership", presented by President Romano Prodi and Vice-President Neil Kinnock, COM(2000)11 final, 18.1.2000; and the Opinion of the Economic and Social Committee on the Commission discussion paper, CES 811/2000, 13.7.2000.

[13] The Treaty of Nice did not constitutionalise the concept of 'civil dialogue', despite the many calls to that effect. But it did amend Article 257 TEC by providing that the Economic and

Union – practically ongoing since the Single European Act of 1986 – and the definition and implementation of its policies and secondary legislation. For these reasons,[14] it has never been more urgent to ask under what conditions the concept of 'civil society' can be a viable one in institutional language. This requires asking which forms the involvement of civil society in the European Union could take, and what are the consequences of adding new mechanisms of participatory democracy to those already in place. The appeal of participatory democracy is so strong that a reference to the concept can now be found in the preliminary draft constitutional treaty presented to the Convention by its president, Mr V. Giscard d'Estaing, on 28 October 2002.[15]

With these questions in mind, this paper proceeds in three parts. A first part will offer a general diagnosis. It will aim at answering the following question: what is wrong with the current relationship between the European Union and its 'civil society' and which pre-conditions should be met before we can fix it? Two issues will be considered: the relationship of 'participatory democracy' to 'representative democracy'; and the coexistence of different rationales for the improvement of participatory mechanisms in the European Union, which needs to be considered before we enter into a discussion on their possible institutional translations. We face these issues in more or less identical terms, whether we wish to improve the contribution of civil society to the constitution-making process in the European Union, or whether we seek a greater involvement of civil society in the policy-making of the EU, between periods of constitutional reform. A second part will analyse more specifically the role of civil society in a 'Convention' such as the one which was entrusted with the drafting of the Charter of Fundamental Rights. I will draw some lessons from such an experience, specifically on the relationship of expert to lay discourses and on the relationship of transparency and openness to input-legitimacy. A third part will focus instead on the contribution of civil society to good governance in the European

---

Social Committee "shall consist of representatives of the various economic and social components of *organised civil society* and, in particular, representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers and the general public".

[14] Perhaps it should be added that another level of participation of civil society in the institutional system of the European Union, situated in an intermediate position – between the constitutional and the regulatory levels – could be that of the annual inter-institutional Conferences encouraged by the European Parliament in the field of economic policy (in its *Resolution on participation of citizens and social players in the Union's institutional system*, adopted on December 10, 1996 (rapporteur Philip Herzog)), and the extension of which to other areas the Economic and Social Committee recently called for (*Opinion of the Economic and Social Committee on Organised civil society and European governance: the Committee's contribution to the drafting of the White Paper*, CES 535/2001, 25.4.2001, 4.9.).

[15] See the document CONV 369/02, 28 October 2002. Article 34 of the preliminary draft treaty should set out the "principle of participatory democracy. The Institutions are to ensure a high level of openness, permitting citizens' organisations of all kinds to play a full part in the Union's affairs". On the implication of civil society in the Convention on the Future of Europe and its broader significance, see further notes 47–51 hereunder, and the corresponding text.

Union. This last part will make a concrete proposal, which might be interpreted as a suggestion to implement the generous, but exceedingly vague, recommendations of the recent *White Paper on European Governance* of the Commission.

I. The Promise of Participatory Democracy

A) Enhanced Participation and the Risk of Paralysis

Although, since many years, the emphasis has been on the so-called 'democratic deficit' of the European Union, that is, the lack of representativeness and direct electoral accountability of those in charge of the definition of the policies of the European Union, the 'deficit' thus defined does not seem to be at the heart of the legitimacy problem faced by the Union. Not only should we avoid the temptation of simply transposing, at the level of the Union, the modes of democratic representation characteristic of the Nation-State. These two levels of governments are not to be compared so directly.[16] More to the point, the 'democratic deficit' derives from the impression that the policy-makers in the European Union, whether or not they are considered authentic representatives of the citizens, have lost the ability to influence the historical course of our societies – if, indeed, they ever had such an ability. The original Treaty of Rome instituting the European Economic Community, the basic philosophy of which was never questioned since 1957, postulated that social progress would naturally flow, as a side benefit of economic growth, from the creation of a wider market where factors of production circulate freely and in which competition is not distorted.[17] The institutional translation of this belief can be found in the imbalance between the political forces required for liberalisation to proceed forward and those which must be gathered for solidarity to be achieved between Member States or populations of different socio-economic conditions within the States. In other words, the presumption remains strong in favour of economic cohesion, rather than of territorial and social cohesion. The decision-making rules provided in the EC Treaty, especially the rules pertaining to vote in the Council of Ministers, reflect that basic choice. For those who seek to improve the modes of participation of civil society in the institutional system of the European Union, then, one of the question at stake

[16] Renaud Dehousse: "Comparing national law and EC law: the problem of the level of analysis", *American Journal of Comparative Law*, 42 (1994), pp. 201–221, at p. 201.

[17] On the consequences of this philosophy on the status of social rights in the case-law of the European Court of Justice, see Carlos A. Ball: "The Making of a Transnational Capitalist Society: the Court of Justice, Social Policy, and Individual Rights under the European Community's Legal Order", *Harvard International Law Journal*, 37 (1996), pp. 307–388, at p. 307.

is how to avoid worsening this imbalance, which already exists, and which leads a growing fraction of the European public to show its scepticism about the capacity of the Union to truly improve their living conditions. The question is how to combine the need for legitimation of the European Union's policies, which requires a larger participation of all those interested, with the maintenance of the room for taking political decisions at the European level, that is, without further disarming the political in the face of the market forces in the construction of the Union. This difficulty stems in part from the problematic choice between favouring participation of all the stakeholders and risking paralysis because of the weight of vested interests, and the obligation not to disturb them.

One way to circumvent this apparent difficulty is by clarifying the relationship between 'representative democracy' and 'participatory democracy'. 'Representative democracy' may not be perfect in the European Union,[18] but it exists. It is based on a particular form of legitimacy by input, that is, that which the citizens of the Union confer on their representatives in the Council and the European Parliament by voting at national and European elections. 'Participatory democracy' does not compete with representative democracy, but complements it. It is based on the action of interest groups and citizens' initiatives. People belong to groups that build up expert and grass-roots knowledge of the social issues in question. These bodies also participate in public information and communication processes, thus helping to create a general perception of the common good. The term 'civil society' implies this type of participation".[19] The committed participation of the citizens is not automatic, but depends on the contribution of each to civic action, and thus it may differ widely from person to person. It is totally voluntary, and based on the free choice of each individual rather than on inherited solidarities of family, class, or religion. It is also pluralistic, in the sense that by joining the organisations of civil society one chooses not only one complete vision of society over others, but also the particular values – environment, human rights, consumers' rights, (...) – one wishes to promote by civic involvement. These differences are far too important to consider that the recognition of participatory rights to representatives of civil society constitute a threat to the classical modes of democratic representation through elections. "By organising themselves, citizens provide themselves with a more effective means of impressing their views on different society-related issues on political decision-makers. Strengthening non-parliamentary democratic structures is a way of giving substance and meaning to the

[18] See the Resolution on the democratic deficit, OJ C 187, 16.06.1998, at p. 229.
[19] Opinion of the Economic and Social Committee on "The role and contribution of civil society organisations in the building of Europe", CES 851/99, 22.9.1999, point 5.2., at p. 6.

concept of a Citizens' Europe".[20] Such "non-parliamentary democratic structures", however, should not add new hurdles to the political decision-making process, but add to its value. This they can do by means of improving the quality of the democratic debate and widening its scope. We should not challenge the legitimacy of the elected representatives by imposing the presence of non-elected representatives, but we should facilitate the adoption, by the elected representatives, of decisions which will be seen as more legitimate by the addressees of the said decisions. The allocation of responsibilities in the decision-making process should not be diluted, but instead more accountability of the elected representatives should be foster. Representatives should in the last instance remain answerable to the people. These, at least, are the principles guiding the proposals made in this paper. One of the strong points of this conception of the relationship between 'representative democracy' and 'participatory democracy' in the European Union is that the move towards participatory democracy does not burden the decision-making process with new requirements (such as the need to taken new interests into account), which do always increase the risk of paralysis of the decision-making process. Participatory democracy should enrich the democratic process, but it should not make it unworkable. It is time for us to abandon the idea that power, in a particular collective, is somehow subject to the law of Lavoisier –*rien ne se perd, rien ne se crée*– so that the recognition of certain powers to some necessarily should go hand in hand with the deprivation of others from the same mass of power. Political power – the power to influence the course taken by a society, and to lead society in a particular direction– does not exist in fixed quantities. Therefore, we can assign powers to new actors without diminishing the capacity of other actors to fulfil the mandate they have been elected for.

B) Competing Rationales of Participatory Democracy

We face other dilemmas. Some derive from the plurality of rationales behind the push for closer co-operation between the European Union institutions and the organisations of civil society. If the reason for strengthening this relationship is 'fostering participatory democracy', then we must rely on the already existing organisations and take as given both their current structures (even when, for instance, the co-ordination at the European level of national organisations remains poor or even non-existing) and their self-chosen goals (even when these goals are purely sectorial or remain defined at a national level, without considering either the other sectors affected or the specifically European dimension). If, on the other hand, the goal is to "contribute to

[20] Opinion of the Economic and Social Committee on the Communication of the Commission, "Promoting the role of voluntary organisations and foundations in Europe", COM (97) 241 final, OJ C 95, 30.3.1998, at p. 99.

European integration" by using the organisations of civil society as channels to the "grassroots level" of the citizens, so as to contribute to "the formation of a 'European public opinion'",[21] then an active role of Union institutions is required in the development of civil society at European level. That will be necessary in order that the organisations can effectively fulfil their task. But we could wonder whether this might not constitute a threat to the independence of civil society.[22] To this we have to add a further concern, namely over the conceptualisation of the *knowledge* to be gained from participation of civil society organisations in the Union's decision-making process. Sometimes, what is meant by knowledge is 'expert input' and 'direct feedback' from those segments of society immediately affected by the policies in question. If that is so, what is trying to be incorporated into policy-making is the specific expertise of the non-governmental organisations and other actors of civil society. Policy-making thus informed, it is argued, should be better devised and more precisely focused; more efficient, if you want, although in a wide sense of 'efficiency' (that is, one according to which efficiency is more than a mere cost-benefit calculus).[23] But other times, by knowledge is meant "the views of specific groups of citizens". When that is so, the democratic-participatory rationale for the consultation of the representatives of civil society is afforded more weight than the informational rationale.[24] The reason why one advocates further participation determines

[21] See, e.g., the Discussion Paper of the Commission: "The Commission and Non-Governmental Organisations: Building a Stronger Partnership", *supra*, fn. 5, at p. 6: "European NGOs and their networks and national members, can serve as additional channels for the Commission to ensure that information on the European Union and EU policies reaches a wide audience of people concerned by and affected by its policies". This is also a rationale for the promotion of "civil dialogue" which the Economic and Social Committee puts forward: "the representatives of organised civil society have a special responsibility and role to play as intermediaries vis-à-vis de general public" (Opinion of the Economic and Social Committee on the Commission Discussion Paper 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership', CES 811/2000, 13.7.2000, point 5.1.).

[22] The concern that the organisations of civil society should not be created or formatted by the European Institutions, but rather be taken as they exist and furnished the capacities to contribute to the European Union is a recurrent theme in the positions taken by the official institutions. See, e.g., the Resolution adopted by the European Parliament on the basis of the report on participation of citizens and social players in the Union's institutional system (A4-0338/96, PE 218.253/déf.) (Herzog Report), par. 35: "political institutions must observe the principle that social players and organisations are independent; [the European Parliament] notes that the role of the former is not to bring the latter into being, but rather to provide them with a legal framework and the means of obtaining information and gaining real access to the institutions". All attempts to better organise civil society around the European Institutions, particularly the Commission, have failed because of that obstacle – that the institutionalisation of civil society may lead to its domestication, and thus to a loss of its subversive potentialities.

[23] Thus, we read in the Discussion Paper of the Commission: "The Commission and Non-Governmental Organisations: Building a Stronger Partnership", *supra*, fn. 5, at p. 7: "Timely consultation with all stakeholders at an early stage of policy-shaping is increasingly part of the Commission's practice of consulting widely, in particular before proposing legislation, to improve policy design and to increase efficacy".

[24] All the expressions quoted are borrowed from the Discussion Paper of the Commission: "The Commission and Non-Governmental Organisations: Building a Stronger Partnership", *supra*, fn. 5. More precisely, the discussion paper mentions, under the heading "Rationale of co-

the attitude that European Institutions should adopt towards the existing organisations of civil society, and to the eventual need to restructure them. Table 1 summarises the consequences which may be drawn from the different rationales for improving the participation of civil society organisations in the decision-making processes of the Union.[25]

It should be emphasised that, in the current debates on improving the involvement of civil society organisations in the European institutions, these different *rationales* coexist as if they were complementing one another, rather than competing with one another. This idealised view can be sustained only by means vague the concrete forms through which the participation of civil society may be encouraged. Once the discussion becomes more focused, once concrete suggestions are made as to how the wish for greater participation can be institutionalised, tensions between the different rationales become evident. How should a selection be made between the organisations of civil society that are competing for political influence in the institutional system of the European Union? Should the European institutions – either the European Commission or the Economic and Social Committee - actively structure the existing networks of organisations, or even, when it is felt necessary, create new networks, and thus encourage the emergence of new actors, or should they take civil society 'as it exists', with the risk of granting even more influence to the organisations which already exercise a disproportionate influence due to their modes of organisation? Should legitimacy result from taking into account the views of those affected by the decision, or should it

---

operation between the Commission and non-governmental organisations", the following five goals: "Fostering participatory democracy"; "Representing the views of specific groups of citizens to the European Institutions"; "Contributing to policy making"; "Contributing to project management"; and "Contributing to European integration". The first two rationales may roughly be considered under the "democratic-participatory rationale" for improving the participation of civil society; the third and fourth rationales may be considered under the "grassroots knowledge rationale"; and the last rationale listed by the Commission closely parallels the "diffusion rationale".

[25] The following scheme improves on Olivier De Schutter, 'Proceduralising European Law: Institutional Proposals', in: Olivier de Schutter, Notis Lebessis and John Paterson (eds.): *Governance in the European Union* (European Commission, 2001), pp. 189–212, at pp. 189, 200. I do not mean that all the arguments currently put forward in favour of a greater involvement of civil society in the institutional system of the European Union fall neatly within one of these paradigmatic rationales. Consider, for instance, the view of the Economic and Social Committee that "civil society organisations can (...) be viewed dynamically as a locus of collective learning. In complex societies, which cannot be run on a centralized basis, problems can only be resolved with active grassroots participation. Various forms of social experimentation and forums for pluralist discussion are a prerequisite for an 'intelligent' democracy and can generate an ongoing process of social learning. In this sense, civil society is a 'school for democracy'" (Opinion of the Economic and Social Committee on "The role and contribution of civil society organisations in the building of Europe", CES 851/99, 22.9.1999). This combines the "grassroots knowledge model", in my tripartite division, with the "diffusion of a European perspective" model – indeed, there is a dialectical interaction between the knowledge gained from civil society organisations and the capacity of these organisations to evolve in the process of learning from the views of other actors, including the European institutions.

be gained, *post hoc*, by the explanation accompanying the decision, and the notification of this explanation to those concerned? These questions are still

TABLE 1

Purposes of the implication of organized civil society	**Democratic-participatory argument**: taking into account the interests of those affected	**Grassroots knowledge argument**: informing the policies with the specific expertise of a particular sector / geographical area / segment of population	**Diffusion of a European perspective**: using the organisations of civil society as a channel for the formation of a truly European public opinion
Selection criteria: which organisations should be implicated?	Representativeness of players	Expertise of players, quality of the information they possess, uniqueness of perspective	Potential audience of players, segments of society they could reach[26]
Role of the European Institutions in organizing civil society at a European level	Equalization of resources between the different players, by distributing information, subsidizing their activities on the basis of their representativeness	No equalization of resources is required: the organisations are chosen precisely because of what they may contribute specifically in terms of information, thus improving the quality of decision-making	More is required than equalization of resources: new actors must be called into existence when some segments of the population or sectors cannot be reached in the absence of other channels
Risks entailed in the chosen mode of implication of organized civil society	Risk of bias due to the weight of the vested interests, making large-scale reforms difficult to effectuate	Risk of bias due to the impossibility of challenging / questioning the perspective of the ground level actors	Risk of bias due to the separation between civil society organized at a European level and the more grassroots, nationally-anchored organisations
Implication of the organised civil society as a source of legitimacy	Legitimacy flows from the fact that the decision takes into account the views of all stakeholder	Legitimacy flows from the objectivity of the information gathered prior to the adoption of the decision, and the impartiality of the expertise gained from grassroots organisations	Legitimacy flows from a pedagogical exercise in the direction of those affected by the decision: it is *post hoc* rather than *ex ante*

without an answer. Although they have been with us for almost ten years (at the very least since the Communication of the European Commission of 2

[26] See esp., among the selection criteria put forward by the Commission in its Discussion Paper on 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership', *supra*, fn. 5, at p. 11: "Their capacity to work as a catalyst for exchange of information and opinions between the Commission and the citizens".

December 1992 on "An open and structured dialogue between the Commission and special interest groups"[27]), clear choices have been postponed to this day. A *de facto* consequence is that the better-organised and better-informed groups of civil society are exercising an influence which other groups are incapable of attaining, although the latter may be more representative, may hold more valuable information, and may even provide more useful and efficient channels between the European institutions and the citizens. A consensus is now emerging according to which the limits of informality have been reached in the consultation of civil society. *Which* civil society needs to be consulted, and *what* consultation should precisely entail are questions the answering of which cannot any longer be postponed.

C) The Implication of Civil Society in Governance: The Open Method of Coordination

To many observers, the July 2001 *White Paper on European Governance* appears as a retreat from far more audacious positions adopted in the course of the discussions preceding its adoption.[28] One could say that it is not in the *White Paper* itself, but rather in the actual implementation of the open method of coordination (OMC) that the most promising attempts to involve civil society actors in the governance of Europe are to be found. It is there, perhaps, that the answers to the questions which have just been posed are most urgently required.

Formally introduced at the Lisbon Summit of March 2000 to apply to the area of social exclusion and poverty, the open method of coordination in fact has its origin in the European Employment Strategy, launched in the Essen European Council of 1994 before leading to the Employment Chapter of the Amsterdam Treaty of 1997. The main characteristic of the OMC is that it transcends the dilemma between the classic Community method and the intergovernmental processes at work in fields where there is no Community competence. Under the OMC, Member States still have the power to develop their own national policies according to their specificities. However, purely opportunistic behaviour by the States is discouraged through the imposition of certain soft-law mechanisms. These mechanisms include the agreement on guidelines at the Union level, the setting of quantitative and qualitative indicators and benchmarks, periodic monitoring and evaluation and peer

[27] OJ C 63 of 5.3.1993. The communication followed upon the declaration on the right of access to information as annexed to the Treaty on European Union and on the Birmingham Declaration adopted by the European Council on 16 October 1992, which called for a more open Community to ensure a better informed public debate.

[28] See, e.g., Joanne Scott and David Trubek: "Mind the Gap: Law and New Approaches to Governance in the European Union", *European Law Journal* 8 (2002), pp. 1–18; or Paul Magnette: "European Governance and Civic Participation: Can the European Union be Politicised?", at http://www.jeanmonnetprogram.org/papers/01/010601.html.

review. In their turn, all these facilitate the exchange of experiences, the diffusion of best practices, and, therefore, they foster a mutual learning process.[29]

One aspect of the OMC is that it encourages the active participation of a larger set of actors than either the classic Community method (relying essentially on the institutions) or the intergovernmental procedures (relying almost exclusively on the Member States). In particular, social partners and civil society organisations are supposed to participate in the preparation of the strategies to be implemented and pursued at the national level. However, the actual practice of Member States appears to be quite below the initial expectations, especially with respect to the formulation and implementation of the national action plans (NAPs) which the States have to prepare within the framework of the European Employment Strategy. Biagi notes that NGOs have mostly been passive observers, informed at best, but not actually implicated or consulted, although social partners have been involved in the NAPs, at least where a strong national tradition of social dialogue already existed.[30]

It is certainly too early to draw definite conclusions on the effectiveness of the inclusion of civil society actors through the OMC in general – indeed, of all the processes launched using this method, only the European Employment Strategy has led to a complete evaluation five years after its inauguration in 1997. Nevertheless, it is already clear that the ambiguities surrounding the call for increased participation of civil society organisations in the OMC have led these organisations to be suspicious of the role they are called upon to play. First, while they are invited to contribute to the implementation of national policies, they do not participate in the definition of the objectives set at the level of the European Union or in the identification of indicators and benchmarks. Their reluctance is pretty understandable given their rather founded complaint of being instrumentalised and deprived of actual influence over the process. They feel confined to the pure role of providers of the information needed by decision-makers and of the much needed appearance of legitimacy. This is especially the case where the social partners or civil society organisations feel a cognitive dissonance between their self-defined *goals* and the *form* of European strategy they are called upon to contribute. Such is the case, notably, in the European Employment Strategy, under the 'adaptability' pillar, where the implicit assumption is that the failure of the Welfare State to integrate certain segments of the active population calls for more incentives

[29] Council of the European Union: "The On-going experience of the Open Method of Co-Ordination", *Presidency Note*, 13 June 2000.

[30] Marco Biagi: "The Impact of European Employment Strategy on the Role of Labour Law and Industrial Relations", *The International Journal of Comparative Labour Law and Industrial Relations*, 16 (2000), pp. 155–173.

.

to seek employment, rather than to remain dependent on public welfare. Second, the call for more participation of new players from civil society has not been combined with the provision of more capabilities, i.e., of both cognitive and material resources, to facilitate such participation, and at least compensate the additional efforts made by civil actor to actually participate. At the bare minimum, these two shortcomings call for a more apt theory of the goals that the participation of civil society organisations should serve, and of the conditions under which such participation can be successful.

II. Civil Society Involvement: Lessons From the Charter 'Convention'

Two were the main objectives of the unprecedented openness to participation of representatives of civil society in the Convention for the drafting of the Charter on Fundamental Rights. First, the involvement of civil society representatives was aimed at establishing the legitimacy credentials of the drafting process (and later, of course, of the text of the Charter itself). The choice of composition and design of the said Convention made in the European Council of Tampere in October 1999 reflect the concern for enhancing the legitimacy of the body. The Council decided to trust the drafting of the Charter to a single 'body' made of representatives of the governments of the Member States, of the national parliaments, of the European Parliament, and of the Commission. Second, the involvement of civil society was to contribute greatly to the visibility of the Charter; after all, the very purpose of the Charter was to make the existence of fundamental rights more visible to their right-holders, that is, to the citizens of the Union (and we should add, to all those whose activities can fall under the field of application of European Union law). Given such objectives, it should come as no surprise that one of the issues which such a process raised was that of the coexistence of expert knowledge, held by some specialists of the matter under discussion, and the lay perspective of the other participants in the debate. Both representatives of civil society and Convention members were very interested in such a tension. The other two issues I address in the following paragraphs are: (B) the consequences of the open character of the drafting of the Charter; and (C) the definition of the mandate of the Convention.

A) Expert Knowledge and the lay Perspective

One striking feature of the drafting process of the Charter was the curious coexistence in and around the Convention of, on the one hand, technicians, mostly legal practitioners and legal scholars extremely well-versed on the protection of individual rights in Community law, and, on the one hand, actors adopting a more political attitude, openly aiming at attaining a

particular result in the process of drafting, such as the inclusion or the exclusion of a particular right, rather than at achieving a document irreproachable as a codification of the *acquis* in the field of fundamental rights. These two discourses could easily have cohabited if the division of tasks among them had been clarified at the outset. This could have been achieved by means of distinguishing the exhaustive enumeration of the rights which could be plausible candidates for inclusion in the Charter from the selection of some rights considered 'fundamental' to the Union's self-definition. The first task could have been entrusted to legal experts, while the task could have been dealt with in an openly political mode. Perhaps, too, the very ambiguity of the exercise contributed to foster the tension between these two discourses. The drafting of the Charter was, indeed, an exercise in codification ("to make visible the invisible", in the words of Jacqué), but at the same time it was a highly political exercise, due to the set of choices which had unavoidably to be made in order to codify, and because of the symbolic dimension attached to the drafting of any bill of rights. Nevertheless, it may safely be said that some of the problems are encountered in all instances, and are not specific to the drafting of the Charter. Therefore, if we are to make progress towards a more systematic participation of civil society representatives in the decision-making processes of the Union, these problems should be confronted and, to the extent possible, solved.

Which are these problems? On the one hand, there is the constant risk of abuse by those commanding expert knowledge of the argument of authority. This is especially so when resort to such a mode of argument serves to hide choices motivated by political preferences. On the other hand, we face the reciprocal distrust of experts towards those actors who regard their own role as political. Behind the technical argument opposed to his proposal ("interesting, but technically infeasible"), we cam doubt whether ideological differences are not lurking. Such cycles of mutual suspicion must be avoided. A way of doing this is by preceding the work within a forum such as the Convention for the drafting of the Charter by the presentation of a substantial preparatory report, explicitly meant to summarise the "existing expert knowledge" on the subject matter under discussion. In addition, the preparatory report could flesh out the different alternatives and present the arguments for and against each of them. Of course, it is rather a truism that there is no clear-cut division between two modes of knowledge ('expert' and 'lay'), two perspectives ('objective' and 'neutral', or 'subjective' and 'engaged'), or more generally, between 'facts' and 'values'. Therefore, it would be totally inappropriate to consider that the mere publication of a technical 'exploratory report' would determine the acceptance or rejection of certain reasons. Nevertheless, the initial preparation of such a report would guarantee a clearer separation between two types of arguments, pragmatically distinct and based on different modes of justification, and regarding which

the participants in a forum such as the Convention are very differently positioned.

Moreover, such a procedure would have other side-advantages which are far from negligible. First the very existence of the preparatory report would render more equal the cognitive resources of the participants. It would equip those least familiar with the question under discussion with the basic tools they require to argue in favour of the values they find most important. It is not enough, indeed, to grant participatory rights to those interested, and to hold a debate from which a certain consensus should emerge. These participatory rights will remain purely formal until accompanied by the capabilities actors need to make effective use of them. This includes the distribution of cognitive resources. The debate will be unsatisfactory in legitimising a decisional process until it comes closer to the ideal situation where all relationships of power are excluded, including the power exercised by those who command the relevant knowledge on those who are deprived of this knowledge. Second, the clarification of the main existing options at the very outset of the deliberation represents an appreciable gain of time and energy; it further limits the possibility of misunderstandings, by means of providing the participants with a common vocabulary and set of references.

B) Openness and Participatory Rights

It has already been mentioned that the work of the Charter Convention was characterised by its total openness. Not only was the discussion transparent, almost completely public.[31] More importantly, the submission of external contributions was encouraged; and when such contributions were received, they were posted on the website of the Convention for commentary. In fact, this openness greatly contributed to the legitimacy of the process, even more so than did the plural composition of the Convention itself. Nevertheless, we should not underestimate some of the side-effects the openness thus conceived has produced. First, it led to a clear transferral of power from its sixty two members to the Secretariat of the Convention, entrusted with the examination of the numerous amendments suggested to the text in discussion. Second, it produced a certain dilution of responsibilities. As the final product resulted from a collective deliberation, no one had to accept completely the full parenthood of the decision. Third, and more importantly, because of the absence of any restriction on whom could actually contribute to the debate on the Charter, the outside observers were not recognised a 'right to be consulted'. Indeed, the more open the consultation process, the lesser the obligation to answer on the institution to be addressed. thus, unsurprisingly,

[31] Only the meetings of the members of the Presidium were not open to the public.

the "right to have one's views taken into account" was degraded into the most banal exercise of freedom of expression.

The latter consequence was not considered by its participants to be a significant deficiency of the Convention process. This may be attributed to the specificity of its object. The identification of the rights to be included in the Charter was closer, in some respects, to a process of discovery, than to a process of political negotiation on norm-setting. And, except for those who feared that the adoption of the Charter could lead in the future to a further extension of the competences of the European Community or of the powers of the European Union, to add new rights to the list under discussion was hardly seen as costly by the actors of the Convention. Indeed, the presumption seemed to be that adding new rights would not automatically lead to subtracting other rights, as in the classical give-and-take of zero-sum games; although such a perception underestimates both the tensions which may exist between competing rights, and the costs, both budgetary and with respect to democratic self-determination, of expanding the list of fundamental rights in a polity. However, notwithstanding its inevitable simplifications, these perceived specificities did contribute to make the Habermasian model of reaching a consensus through free discussion particularly plausible in the context of the Convention. Still, were such a model to be imported in other settings than the Convention, its affinity with the allocation mechanisms of the market would soon become apparent – and the implicit image of the invisible hand, whereby the free exchange of ideas is presumed to lead necessarily to the best approximation of the truth, would show its limits. The opening up of the decisional process to all those interested could, in fact, amount to the possibility for the better informed, the better situated – in sum, for those having the most resources at their disposal – to impose their views, by exercising an influence which there is no reason to suppose will be proportionate either to their representativity or to the quality of the knowledge they contribute.

I would suggest that it is possible and necessary to open up to a much wider range of interests procedures such as the intergovernmental conferences, which have traditionally been secretive. The form of 'openness' exemplified in the Convention is neither the only nor the most useful one available. If participation of civil society in such processes in the future is to become a reality, its organisations need to be better structured, and the dialogue with the representatives chosen by electoral means better formalised. We should face the fact that a number of the groups which have been most active around the Convention for the drafting of the Charter of fundamental rights did not actually represent the interests in the name of which they were intervening. Even a superficial examination of their claims to representativity would have made it more difficult for self-proclaimed spokespersons to use the Convention as a channel to diffuse views which, by far, were not always shared by those they claimed to represent.

It is true that the concept of the 'representativity' of civil society organisations is highly debatable, and that it might be open to all sorts of manipulations. What emerges from the current discussions, and what I would personally favour, is a two-tiered definition of this requirement. The first limb should be applicable to all organisations, while the second should remain variable. Some criteria, indeed, can be imposed on organisations of civil society insofar as these criteria are presupposed by the very claim of these organisations to represent certain interests at the European level. Thus for example, it could be required that these organisations "exist permanently at Community level", that they "represent general concerns that tally with the interests of European society", that they be accountable to their members and, indeed, have received from their members the "authority to represent and act at European level." All this whilst remaining independent of external bodies, from which they should not be received mandates or instructions.[32] Although the imposition of these or other requirements can be disputed,[33] the idea of imposing certain basic conditions one those organisations expressing a will to take part in the civil dialogue seems hardly contestable. At a minimum, a certain correspondence between, on the one hand, the claim to representativeness of the organisation, and on the other hand, its membership and modes of internal decision-making, could be required. Such a requirement amounts to little more than to ask for equivalent criteria of transparency in these organisations as those imposed on the institutions of the Union themselves. Beyond general requirements of that nature, certain specific criteria of representativeness could be requested from the organisations, according to the category they belong to. The view of the Economic and Social Committee is that

> [if] representativeness were to be measured solely by the number of members of NGOs, that would be tantamount to failing to grasp the basic principles of civil society. Civil-society initiatives often come to the fore in areas where there is not (yet) a general awareness of a problem, such as was the

[32] These elements are borrowed from the list of 'criteria for representativity' put forward by the Economic and Social Committee in its Opinion on 'Organised civil society and European governance: the Committee's contribution to the drafting of the White Paper', CES 535/2001, 25.4.2001, point 3.4.1., at p. 6.

[33] For example, in the same Opinion, the Economic and Social Committee insists that to be recognised as entitled to participate at European level, the organisation must "comprise bodies that are recognised at Member State level as representative of particular interests". However, it may happen that certain organisations, although representative in fact of the interests it speaks for, will be ignored by official channels of representation within the State, for instance because of the slowness with which institutions incorporate new actors or for even less excusable reasons. It seems that this criterion gives too much weight to the recognition of actors at Member State level; in the worst scenario, the reliance on such a criterion could even threaten the very independence of the organisations concerned, especially when they are critical of governmental policies.

> case in the environment field some years ago. (...) [A]ssessment of the degree of representativeness of NGOs must under no circumstances be based solely on quantitative criteria – it must also involve qualitative criteria. Whether or not NGOs are representative can therefore not be established exclusively on the basis of the number of members whom they represent. The judgment must also take account of the ability of such bodies to put forward constructive proposals and to bring specialist knowledge to the process of democratic opinion-forming and decision-making.[34]

Indeed, the reasons for an improved participation of the organised civil society in the institutional system of the European Union are rather variegated, [35] and the same goes for the types of organisations coexisting in the 'civil society' and the incentives those whose interests these organisations promote may have or may not have to become members[36]. The criteria of representativeness should reflect this heterogeneity. Moreover, they should be applied in a material rather than in a formalistic manner. However, these criteria should exist, and they should be sufficiently well defined and transparent to avoid their discriminatory application.

Far from constituting a threat to the 'independence' of the civil society organisations or from bridling their creativity, the ensuing 'structuring' would present two major advantages. First, it would guarantee a more democratic diffusion of the information at the earliest stages of the decisional process. This would constitute a huge step forward from the current situation, where in many cases the 'useful information (i.e., the information available when the policies are first shaped, and not simply implemented or translated into legal texts) is acquired on a more or less random basis, depending on the competence of the organisation, sheer luck and the links it has managed to build within the institutions. This will

---

[34] Opinion of the Economic and Social Committee on the Commission discussion paper 'The Commission and non-governmental organisations: building a stronger partnership' (COM(2000) 11 final), CES 811/2000, 13.7.2000, point 2.2.5., at p. 4.

[35] We have identified three at least of such reasons: participatory democracy; the adoption of policies informed by grassroots knowledge; and the wide diffusion of the European perspective so that the policies are better understood by those in charge of implementing them or affected by them.

[36] Whether the organisation seeks advantages which will mainly benefit its members, all those having certain characteristics in common, or the general public, will be especially relevant when deciding whether its 'representativeness' is to be made dependant on the number of its members. This is a *locus classicus* of the interest-groups theory at least since Mancur Olson: *The Logic of Collective Action. Public Action and the Theory of Groups* (Harvard University Press 1966). See also Werner Elhauge: "Does Interest Group Theory Justify More Intrusive Judicial Review?", *Yale Law Journal*, 101 (1991), pp. 31–110, at pp. 36–37; Gary S. Becker: "A Theory of Competition Among Pressure Groups for Political Influence", *Quarterly Journal of Economics*, 98 (1983), 371–400, at p. 371; George J. Stigler: "The Theory of Economic Regulation", *Bell Journal of Economics and Management Science* 2 (1971), pp. 3–21, at p. 3.

constitute an advantage whether or not the organisations of civil society are granted more than simply the right to express their views, i.e., whether or not they are granted a 'right of consultation' worthy of the name. Second, a better 'structuring' of the organisations of civil society would render it possible to go beyond recognising these organisations a 'right to be heard', and to ensure instead, as the European Commission has described it, "that [the organisations of civil society] receive appropriate feedback on how their contributions and opinions have affected the eventual policy decision, thereby making the relationship a real dialogue".[37] The absence of such a 'real dialogue' was built into the otherwise laudable choice of the Convention to open its forum widely to all the groups wishing to put views forward. Indeed, if such a 'real dialogue' implies a right of the organisation to receive a reasoned answer to the suggestions it puts forward, it is realisable only insofar as a selection is made among the organisations. In that sense, a better 'structuring' of civil society should not be seen as imposing an obstacle on their participation which would not have existed previously; it is, rather, the condition for getting us closer to the recognition of participatory rights which are the very ingredients of a participatory democracy.

C) The Mandate of the Convention

It is well known that the European Council of Cologne had defined the mandate of the body set up to draft the Charter rather narrowly. The Convention was to agree on the content of a Charter of fundamental rights, but the Charter should not assign new or tasks to the European Community or to the European Union. The Convention was not to discuss the scope of the jurisdiction of the European Court of Justice, or the need for enlarging the *locus standi* of individual applicants seeking the annulment of a Community measure, although the current interpretation of article 230 of the EC Treaty is generally considered as an obstacle to an effective protection of fundamental rights in the Community legal order.[38] The Convention was to take no

[37] Commission Discussion Paper: "The Commission and Non-Governmental Organisations: Building a Stronger Partnership", *supra*, fn. 5, at p. 10.

[38] See, e.g., Ami Barav: "Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court", *Common Market Law Review*, 11 (1974), pp. 191-198, at p. 191; Paul Craig: "Legality, Standing and Substantive Review in Community Law", *Oxford Journal of Legal Studies*, 14 (1994), pp. 507-537; Anthony Arnull: "Private Applicants and the Action for Annulment under Article 173 of the EC Treaty", *Common Market Law Review*, 32 (1995), pp. 7–49, at p. 7. After the European Court of Justice itself had expressed its concern about the consequences of the requirements of (then) article 173 TEC (now article 230 TEC) on the protection of fundamental rights in the Community legal order (see its Report of May 1995 on certain aspects of the application of the Treaty on the European Union, point 20), the Irish presidency of the second semester of 1996 suggested an extension of the *locus standi* of individual applicants when the action of annulment of a Community measure of general applicability concerned a violation of fundamental rights (see Conference of The Representatives of the Governments of the Member States, Presidency Suggested Approach, 8 October 1996, CONF/3945/96, at p. 4). However, neither this

position on the question of accession of the European Community (or the European Union) to the European Convention on Human Rights, although, obviously, the adoption of a Charter of fundamental rights placed this question at the forefront of the European debate.[39] Although the Convention was to draft the text of the Charter, the decision on its legal status – whether or not to include it in the Treaties – was to be left to the European Council. At last, the Convention was to dissolve once its members could agree on a project to be presented to the Council. Therefore, it was deprived of any opportunity to follow up on its work. In brief, such a mandate was characterised by its tightness, by being defined once and for all, and by the exclusion from the powers of the Convention of following-up the consequences of applying the outcomes of its deliberations.

If we consider the role to be assigned to the Convention in the future reform of the primary law of the Communities, we perceive that a mandate such as the one given to the Charter Convention poses at the very least two problems.

First, identifying what should be the precise scope of the mandate of a Convention of such type might not be always possible. Thus, if a Convention were to be convened on how to achieve sustainable development in the Union, it would be possible that, beyond environmental matters *stricto sensu*, it would (perhaps should) enter fields like transport, telecommunications, or the common agricultural policy? An eventual Convention set up to draw different scenarios for reforming the institutions in order to meet the needs of the enlargement would not face the same difficulty. But at least as long as any Convention is sectorialised, it might be useful to introduce the formal possibility of a revision of its mandate. This could be achieved by means of allowing the Convention set up for one particular purpose to redefine its mandate once it comes clear in its deliberations that the initial framing of the problem was in fact inadequate.

Second, the lack of any possibility for the Convention to follow-up on its work would place us before an absurd choice between two bad options. One the one hand, the undermining of the value of its work, which, once the Convention has dissolved, would seem to be subordinated to the contingencies of political agendas and priorities, and to the classical deal-making of everyday political processes. Or, on the other hand, the

---

suggestion, nor the Belgian suggestion in favour of an action for annulment in the public interest which could be introduced by representative associations, were followed upon by the Intergovernmental Conference. In its judgment of 25 July 2002 in the case C-50/00P, *Union de Pequeños Agricultores*, the Court of Justice reaffirmed, against the opinion of Advocate General Jacobs, and refusing the judgment of the Court of First Instance in Case T-177/01, *Jégo-Quéré and Cie v. Commission*, of 3 May 2002, that it may not change the interpretation of Article 230(4) TEC, which it constructs as requiring the individual applicant to have a direct and individual interest in the annulment of the measure, if it is not a decision addressed to him. A change of primary law in this regard is more than ever.

[39] See the Finnish proposal of 22 September 2000 on the accession of the European Community to the European Convention on Human Rights (CONFER 4775/00).

sacralisation of the work of the Convention, which could become almost impossible to amend due to the legitimacy it would be endowed with, and because any change would be interpreted as a disavowal to the Convention. In fact, the Charter Convention was plagued by both troubles. The public had the impression that the members of the Convention, and the great number of actors around them, had made enormous efforts, just to be rewarded with what resembled a *fin de non recevoir* by the European Council of Nice (by the decision to *merely proclaim*, not to incorporate, the Charter). However, one should qualify this statement by observing that after the proclamation of the Charter it would be rather hard for one Member State to suggest that the 'right to work' doesn't go far enough in the direction of a right to employment, or that environmental protection really has no place in a Charter of fundamental rights.

Perhaps part of this dilemma may be attributed to the very task– drafting a Charter of fundamental rights – which was attributed to the Convention set up by the European Council of Tampere. The dilemma, nevertheless, may be relatively easily circumvented. The adoption by a Convention of a single text or a set of proposals places governments in the delicate position of having either to set it aside (making one wonder whether the Convention was worth the effort) or to adopt it without modification (making one wonder whether the Convention is not just an alibi for not assuming responsibility). However, if a Convention is entrusted instead with the task of identifying different scenarios or enumerating a number of proposals, possibly in contradiction with one another but which have gained sufficient support among its members and have passed, at least provisionally, the test of public deliberation, the difficulty would not arise. This, indeed, is the way the mandate of the Convention entrusted with the preparation of the next intergovernmental conference is defined. Another way out of the dilemma, though perhaps too ambitious, would be to recognise a *droit de repentir* to any Convention. On completion of its first report, the Convention could submit it to the Council and, taking into account the reaction of the Council and, perhaps, of other actors, it could reconvene and revise its initial proposals. That would be done in the hope of achieving a consensus without being deprived of their legitimacy as a Convention.

III. The Contribution of Civil Society to Governance in the European Union

The participation of civil society organisations in the institutional system of the European Union, in European decision-making, may be realised in different ways. The different options can be graphically represented on an axis with at least four positions. We may call these mechanisms, of which a number of variants may of course be imagined: *participation*, *committed consultation*, *simple consultation*, and *freedom of expression*. In its opinion

on "Organised civil society and European governance", the Economic and Social Committee defines 'participation' as "providing the opportunity [to the organisations of civil society] to help shape an opinion-forming and decision-making process in accordance with democratic principles".[40] The same opinion defines 'consultation' – what I call here 'simple consultation' – as including "all initiatives that enable whoever is affected by a measure to express their views at the earliest possible stage".[41] These two forms of participation are presented as exhausting all the potential options. To quote again:

> Civil dialogue could become the key instrument for participation in the European democratic model. Civil dialogue is based on public debate, which extends to legislative matters. However, it will be essential to bear in mind that consultation and participation are two different forms of involvement that are governed by different conditions.[42]

However, this would imply leaving aside the mode of participation which is at equal distance from 'participation' and from 'simple consultation', and which I call here, by lack of a more adequate term, 'committed consultation'. Insufficient account is taken of the fact that It neglects that the organisations of civil society can indeed influence the decisional process in the European Union whether or not they are formally involved in that process *by virtue* of the freedom of expression which is recognised to them. This point might seem rather obvious, but it is still worth making, as it partially takes care of the concerns of those who fear that a 'domestication of contestation' could result from a further institutionalisation of civil society in the European Union.

The term 'committed consultation' is coined to point out the specificity of this form of consultation, which is to impose obligations on the consulting institution. In its resolution of 10 December 1996 regarding the participation of citizens and social players in the institutional system of the European Union, the European Parliament

> stresse[d] the importance of a general principle (to be written into the Treaty) proclaiming the right of every citizen and every representative organisation to *draw up and promote their opinions and to receive replies directly or indirectly, without*

[40] Opinion on "Organised civil society and European governance: the Committee's contribution to the drafting of the White Paper", CES 535/2001, 25.4.2001, point 3.4, at p. 5.
[41] Opinion on "Organised civil society and European governance: the Committee's contribution to the drafting of the White Paper", CES 535/2001, 25.4.2001, point 3.5., at p. 6.
[42] Opinion on "Organised civil society and European governance: the Committee's contribution to the drafting of the White Paper2, CES 535/2001, 25.4.2001, point 4.8.1., at p. 12.

> *that right however implying direct participation in decision-making*.[43]

If extended to 'every citizen', such a right to voice opinion and to receive an answer could appear unmanageable. Still, it would be possible to grant such a right to organisations recognised as representative in a particular field, and thus to guarantee to such organisations a right to be heard, to receive an answer, and if the answer is found to be unsatisfactory, to apply for a judicial review of the quality of the grounds given in response to objections made in the course of the consultation procedure.[44] Such a right to be heard, strengthened by judicial review, would not be a matter of simple consultation, where no control whatsoever exists on the quality of the answer. Nor would it amount to participation in the decision-making procedure, for it remains perfectly possible for the competent institutions to decide against the point of view expressed by the organisation.

Moreover, such a form of involvement of the organisations of civil society seems more promising than both participation and simple consultation. Participation implies further accentuating the lack of accountability of European institutions, which already suffer from what is perceived as the opacity of the decisional procedure, as well as from the implications of the large number of actors involved in the process. It risks further depoliticising the decision-making mechanisms of the Union, whilst what can be argued is that repoliticisation is what is needed. As to simple consultation, although this seems the avenue chosen by the *White Paper on European Governance*,[45] it runs the risk of remaining purely formal. At its best, simple consultation may be a way of legitimising decisions which are

---

[43] Resolution adopted on the basis of the report on participation of citizens and social players in the Union's institutional system (A4-0338/96, PE 218.253/déf.) (Herzog Report), point 24 (my italics). The resolution calls such a right a 'right to freedom of expression'. The explanatory memorandum defines consultation as "the possibility of delivering opinions and receiving answers. The decision-making power delegated to the central institutions in not being called into question (...). A clear distinction, however, needs to be made between consultation, a very broadly based procedure, and dialogue and negotiation, in which representative social players confer with governing bodies" (see p. 11).

[44] Of course, the quality of the answer to be provided to the organisation which has put forward its arguments in such a form of consultation would depend on the weight of these arguments, some of which may appear of little value. Comp., in the context of an article of the ECSC Treaty which required the Commission "to give the party concerned the opportunity to submit its comments" before imposing a penalty, Case 9/83, *Eisen und Metall AG v Commission* (1984) ECR 2071, at p. 2086 (para. 32).

[45] In its most explicit paragraph on this matter, the *White Paper* states: "Creating a culture of consultation cannot be achieved by legal rules which would create excessive rigidity and risk slowing the adoption of particular policies. It should rather be underpinned by a code of conduct that sets minimum standards, focusing on what to consult on, when, whom and how to consult. Those standards will reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectorial interests or nationality, which is a clear weakness with the current method of ad hoc consultations. These standards should improve the representativity of civil society organisations and structure their debate with the Institutions" (at p. 17).

taken on other grounds. At its worst, it would be totally useless, especially if it is not coupled with the possibility to seek judicial review of the quality of the answers to the objections put forward. 'Committed consultation', compared to these alternatives, fits better with the relationship of participatory democracy to representative democracy which was briefly described above. It should render the consultation process immune to the claim that, no matter how relevant and important, the inputs from civil society would be taken into account, if at all, if they also gained political support. This was the generalised impression of the organisations heard by the Convention drafting the Charter of fundamental rights. We should keep in mind that no obligation was imposed on the Convention to justify its decision not to follow up the suggestions made by civil society.

Which precise forms could such a 'committed consultation' take, if the 'civil dialogue' were to be organised in this mode? One possibility would be the following. First, questions of general interest on which the organisations of civil society could usefully comment should be identified and listed. Such questions could be those affecting interests which are widely diffused, but fragmented, and thus possibly underrepresented in the democratic process; those affecting weak interests, which run the risk of being ignored or insufficiently protected, for instance, those of minorities or future generations; those interests closely dependent on specialised or local knowledge, because of the need to contextualise the regulatory solutions adopted. To name just a few concrete matters, we could refer to gender equality, environmental protection, consumer protection, the status of third country nationals, or poverty. On these matters, consultation of the organisations of civil society could truly add value to public deliberation. Therefore, a number of fora, perhaps one per area of concern, could be constituted. In each of these fora, the 'most representative organisations' of the field would be invited to participate. For the abovementioned reasons, the criteria of representativeness should vary from forum to forum, although some criteria of representativeness could be common to all the organisations to which a 'consultative status' would be granted.

These fora should perform at least two tasks. First, they should be consulted on the legislative proposals which may affect the interests they represent, or which they believe might do so. Such a consultation should lead to the definition of a harmonised position of the representative organisations within each forum. These organisations, after an internal deliberation, should thus come forward with a coordinated position. Such a position should achieve two things. On the one hand, it should render easier the decision of the institutions; after all, institutions are not expected to arbitrate between the different views of the organisations speaking for the same collective interest or to decide to which views more weight should be given to. On the other hand, it should make possible to impose on the institutions an obligation, namely to opt between taking into account the position expressed by the

consulted forum, or else motivating the refusal to take into account this position. This mode of 'committed consultation' would entail, for example, that when a particular measure presents a risk for the protection of civil liberties, the forum 'human rights', where the main organisations of that sector would be represented, would be asked to take a position. Once such a position is established, the institutions entrusted with the decisional power would be obliged to act in accordance with the concerns expressed in that position, or if they refuse to do so, explain why. The concerned forum would then have the additional right to challenge the decision before the European Court of Justice, if unsatisfied with the reasons put forward by the institution.

Incidentally, it will be noted that the possibility of obtaining judicial review in such a case partially compensates for the limited possibilities of individuals to seek the annulment of Community measures of general applicability, under Article 230 TEC. One of the consequences of the restriction currently stemming from the case-law of the European Court of Justice on the *locus standi* of individuals is that associations may not invoke the collective interest for the pursuance of which they are constituted to challenge a Community measure. To put it briefly, they are barred from stand before the Court and demand the annulment of the measure under Article 230 TEC.[46] Such an action will be normally inadmissible,[47] unless the association can show that its position as a negotiator in a particular sector has been affected by the measure which is challenged,[48] or unless the association, in fact, is simply acting on behalf of its members for reasons of procedural economy where these members individually would have standing to seek the annulment of the challenged measure.[49] In the proposal advocated here, associations considered to be among the most representative in a particular domain will have the possibility to contribute to the preservation of the legality in the Community legal order, insofar as the forum which they belong to would be recognised as a 'semi-privileged' applicant under Article 230 TEC, and would have the power to seek the annulment of the measure adopted – in the view of the interested forum - without sufficient consideration of the objections or concerns it put forward when consulted.

Besides their consultative role, these fora should be entrusted with the evaluation of the policies of the European Union. That is, they should be able to examine the impact of these policies on the fulfilment of the values for the preservation of which the forums of the organised civil society are set

---

[46] For a more detailed presentation of this technically complex question, see Olivier De Schutter: "L'accès des groupements à la justice communautaire", *Journal des tribunaux-Droit européen*, 61 (1999), pp. 153–161, p. 153.

[47] Joined Cases 16 and 17/62, *Confédération nationale des producteurs de fruits et légumes e.a. v. Council EEC*, ECR 901 (1962).

[48] Joined Cases 67, 68 and 70/85, *Kwekerij Gebroeders van der Kooy b.v. e.a. v. Commission*, ECR 219 (1988) (para. 21).

[49] Joined Cases T-447/93 and T-449/93, *AITEC e.a. v. Commission*, ECR II-1971 (1995) (para. 60).

up. Such a systematic evaluation is crucially needed in the present context, as is explicitly recognised by the *White Paper on European Governance*. This would introduce a degree of reflexivity in the development of European policies, to the extent that they would have to revised in view of their consequences. It would contribute immensely to progressively building the knowledge of the actors involved in the process of evaluation, thus constituting one of the self-learning mechanisms that the *White Paper* calls for.[50] A virtuous cycle can be expected to result from these evaluation processes. The more seriously these processes are taken and the more they facilitate learning processes, the more the representative organisations of civil society will acquire the capabilities required to effectively exercise their participatory rights, the more weight will be given to the positions they introduce into the decisional process, and the more their consultation will be seen as adding quality to the decision-making, rather than burdening it.

As already mentioned, the preliminary draft constitutional treaty presented to the Laeken Convention on 28 October 2002 makes reference to the notion of 'participatory democracy'.[51] In this chapter, I have argued that the 'committed consultation' model of such participatory democracy may be the most promising route to realise participatory democracy. It should be added that, when presenting the plans to hold a Convention plenary session devoted to hearing civil society (which actually took place on 24–25 June 2002), the Secretariat of the Convention suggested that "[i]n order to allow for representatives from civil society to report directly to the Convention, European NGOs should be invited to identify, for each major sector of interest, a speaker to convey their collective views".[52] Before the plenary session, eight contact groups were organised, corresponding to different sectors of civil society. Each was chaired by a member of the Convention.[53] These contact groups brought together organisations from, respectively, the social sector – including the member organisations of the Social Platform[54] – the sector of the environment, academia, regions and local authorities, human rights, development, culture. The eighth contact group comprised the organisations interested in improving the constitutional structure of the Union, especially on what regards citizen participation, under the heading "Citizens and Institutions". Aside from the substantial proposals made in

[50] See COM(2001) 428 final, 25.7.2001, at p. 26.
[51] Neither the notion of 'civil dialogue', nor that of 'social dialogue', appears in the draft text.
[52] The Convention and civil society, Note from the Secretariat of the Convention to the Convention (CONV 48/02), Brussels, 13 March 2002, at p. 2.
[53] See on these contact groups, Information Note from the Secretariat to the Convention (CONV 120/02), Brussels, 19 June 2002.
[54] The Social Platform (Platform of European Social NGOs) is an association of approximately 30 European NGOs working in the social sector, including organisations representing women, older people, people with disabilities, unemployed people, migrants, people living in poverty, gays, lesbians, young people, children and families.

these fora,[55] the form which this consultation took is worth being Considered. Within each of these contact groups, a limited number of spokespersons naturally emerged from the open discussion held under the supervision of a member of the Convention. These spokespersons were given three to ten minutes to express the views of the organisations present in the contact group before the plenary session of the Convention.

In my view, this form of consultation, which implies the selection of representatives for each sector of civil society and the recognition of the right of these representatives to be heard and receive answers to the concerns they express, approximates what a 'civil dialogue' could resemble, were such a notion – or the wider notion of 'participatory democracy' – to be recognised in the future Constitutional Treaty.

IV. Conclusion

Proposals favouring a better 'structuring' of the organisations of civil society and the granting of participatory rights to these organisations generally face two types of critiques. First, it is argued that any form of institutionalisation leads to the 'domestication' of civil society organisations, that is, to the reduction of their creativity or the taming of their 'subversive' capacity. Second, it is claimed that such an institutionalisation would be disruptive of the classical modes of decision-making through political representatives who have received a mandate from the voters and are politically accountable. This is an extremely problematic development to the extent that granting participatory rights to the organisations of civil society might lead to the dominance of private (particular) interests over the common good. Whilst the voter acts as a citizen, the individual involved in a civil society organisation might further his selfish or corporatist interest to the detriment of the collective interest of whole community.

[55] For example, within the contact group 'Citizens and Institutions', participants mentioned both the notion of 'civil dialogue' to be recognised alongside 'social dialogue', and "the right of citizens to participate in all stages of European decision-making and implementation of decisions, particularly via consultation in the context of a real partnership and joint evaluation in the political results achieved". In the contact group 'Environment', organisations called for the inclusion in the Treaty of "broad, open and timely public participation". The organisations from the 'Social sector' called for the formal recognition in the Treaty of the role of civil society, including a right to be consulted – a position already adopted by the Platform of European Social NGOs, which calls for the recognition of the consultative role of NGOs within a structured civil dialogue, through the creation of a Treaty article on consultation of civil society" (Social Platform, Contribution to the Convention on the Future of Europe, 15 April 2002, at p. 7). The "Regions and local authorities" called for the "principles of good governance" to be written into the Treaty and denounced the "shortcomings of consultation by means of Green or White Papers"; they also advocated a 'consultation code' to ensure transparency of consultations led by the EU.

I hope to have persuaded the reader that these critiques lack a solid foundation. It has been claimed in this chapter that the 'structuring' of the organisations of civil society in order to realise the participatory rights which could be granted to them does not limit their ability to act or make themselves heard through other means. 'Structuring' adds a further avenue of action, it does not suppress previous alternatives. As to the risk that the deeper involvement of the organisations of civil society might lead to the dominance of uncontrolled private-interest groups, the avoidance of such a risk calls not for maintaining the *status quo*, but for a deeper 'structuring' of civil society. Indeed, such a 'structuring' should include a control on the internal modes of decision-making of the organisations claiming to be 'representative'. Such a claim will be considered to imply that the internal rules of the organisation should be democratic and regularly applied. As to the co-optation of the representative organisations in the institutional system of the European Union, it can be expected to lead to a proper consideration (we could say, to a laundering) of the preferences defended by these groups.[56] Once these organisations, instead of lobbying and competing behind the scene for political influence, will be invited to officially take positions when consulted on how certain measures or policies will affect the interests which they represent, they will have to redefine these very interests in the light of the arguments of others. Their initially 'brute' interests, or 'naked preferences'[57] will have to leave way to more rationally defined interests. Such interests will have to be defended on the ground that they contribute to the common good or, at the very least, that they taking proper account of the general interest of the collective. It is in this way that Europe can hope to find its civil society. Neither by rendering sacred civil society as it exerts influence at present, nor by instrumentalising it, but by granting it certain participatory rights, and thereby encouraging the organisations of civil society to reframe the interests they speak for in the light of the European common good.

[56] See Robert E. Goodin: "Laundering Preferences", in Jon Elster and Aanund Hylland (eds.): *Foundations of Social Choice Theory* (Cambridge:Cambridge University Press 1986), chapter 3, for a formal presentation of the concept. For a sceptical view, see Jon Elster: "The Market and the Forum: Three Varieties of Political Theory", chapter 4 of the same volume.

[57] See esp. Cass R. Sunstein: "Interest Groups in American Public Law", *Stanford Law Review*, 38 (1985), p. 29-87.

Chapter 8

Goal Congestion
Multi-purpose Governance in the European Union

Daniel Tarschys

The Charter of Fundamental Rights exemplifies both multi-level and multi-purpose governance in the European Union. No previous instrument in the history of European integration ever emerged from such broad participation. Drafted jointly by representatives of the Council, Commission, the European Parliament and the national parliaments, and with inputs also from a wide range of other bodies (the Committee of the Regions, the Economic and Social Council, the European Court of Justice, the Council of Europe, representatives of the candidate countries and a very large number of non-governmental organisations), the Charter of Fundamental Rights was shaped through an exceptionally wide consultation of different actors. Linked to this was a wide spectrum of political motives. If the procedure was genuinely innovative, the combination of explicit and implicit objectives behind the Charter presents a more familiar picture of EU policy-making, where goal congestion or multi-purpose governance are frequent phenomena.

How did the convergence of objectives in this particular case, the Nice Declaration, fit into a more general pattern of policy-making in the European Union? How did explicit goals relate to implicit goals? To what extent did institutional aspirations interact with ambitions to bend or expand the EU involvement in particular policy areas? These are some questions to be addressed in this contribution.

I. Explicit and Implicit Goals in EU Policy-making

As new-comers to the legal landscape of the European Union, Swedish legislators and government representatives stumbled into an unknown forest of preambles. In the land of the *acquis communautaire*, every important normative text seemed to start with its own selection of 'aving regard to' and 'whereas' before the real message was presented. While used to extensive explanations of motives and lengthy written considerations attached to any proposed new legislation, Swedes were not too familiar with this particular form of solemn and laconic references to the constitutional (or treaty) foundations, the preceding proposals and the fundamental objectives behind any particular piece of legislation. Those involved in international treaty-

making had of course met them as standard prefaces to conventions, and international lawyers aware of the 1969 Vienna Convention would know that preambles might legitimately be referred to in the interpretation of such instruments.[1] But in Swedish domestic legislation, preambles are no longer in use. If the 1809 Constitution had begun with a lengthy introductory explanation, the current 1974 Constitution starts head-on without any prefatory statement.

To this day, the legal implications of these recitals remain something of a mystery to those steeped in Scandinavian jurisprudence. Yet with a few years' experience of Union legislation they are now beginning to appreciate that these introductory trumpet blasts are not merely ceremonial. Besides serving as bases for the specific legal acts in the European Union and staving off objections of mandate transgressions, preambles constitute a rich if not always exhaustive source of information about the reasons and motives behind particular advances in European integration, and the many objectives frequently heaped one upon the other reflect the complexity of EU policy-making.

One facet of this complexity is the interplay of impulses and initiatives from different actors in the nascent European political system. The last few years have seen a growing literature on the phenomenon of *multi-level governance* in the European Union.[2] This concept testifies not only to the growing role of regional and non-state participants in the political process but also to the loosening up of traditional political hierarchies. With decision-making and implementation increasingly diffused to networks, partnerships and private actors, the vertical distribution of political competence is gradually being supplemented by horizontal channels of influence. Governance has come to stand for a wider, more comprehensive and less bounded pattern of policy-making and policy implementation than old-fashioned government and public administration.

Another facet and the particular topic of this paper on the Charter of Fundamental Rights, is the confluence and overlapping of many motives in the same piece of legislation, a phenomenon that I propose to call *goal congestion* or *multi-purpose governance*. Preambles disclose some such objectives though not necessarily all that have moved the various participants in the policy process to agree on a common decision. Besides the motives explicitly stated in the introduction to the legal act, there are frequently others that may have been mentioned during the preceding deliberations, and sometimes a third set that remains entirely implicit but is nevertheless well understood by those observing the policy process at close range. A different way of putting this is to emphasise the famously blurred border line between

[1] Cf. chapter 6 in this volume, fn. 30.

[2] For an early statement, see Gary Marks, Liesbet Hooghe, and Kermit Black: "European Integration from the 1980's: State Centric vs. Multi-level Governance", *Journal of Common Market Studies*, 34 (1996), pp. 341-78.

goals and means. What is instrumental to one actor may well be *finalité* to another one.

Goals are combined in many different ways. A couple of introductory examples may illustrate this point:

- Many statements of objectives refer to both *proximate* and *distant* goals. The former are often portrayed as instrumental in the pursuit of some ultimate finality, as concrete means leading to more abstract ends. While the long range is important for some participants in the policy process, the short range is more crucial to others. In order to rally support for specific measures or courses of action, it is customary to legitimise policy proposals in the name of the more far-reaching and comprehensive purposes that they might ultimately serve.

- Another distinction can be drawn from the tendency of EU policy decision-making to be based on a process of *barter over time*. In the Council of the European Union, a minister will frequently present an acute political problem that has arisen in his country. If the knot can be untied without creating perilous precedents and excessive costs to the other member countries, he will often receive a sympathetic response from his colleagues and find them willing to make a friendly gesture. Solidarity and team-spirit certainly inspire such generosity, but another motive may be the expectation that next time around someone else will be in need of assistance. To function efficiently in committees, members therefore tend to accept decisions favourable to others in order to accumulate a capital of indebtedness that they themselves can draw on when other issues arise. A golden rule is to keep quiet on most matters that are not important to yourself. The decision reached may thus be in tune with the self-interest of one country only, while the prime motive of the fourteen others is to remain on good terms with this particular country and be able to count on its co-operation in the future. In the latter case, the objective is not so much substantial as it is relational. Compromises are made through a form of exchange over time, with credits and debts building up. Scholars analysing this type of decision-making sometimes refer to it as ‘government by committee’ or ‘government by amicable agreement’.

- A third well-known motivational dichotomy is that between *demand-side* and *supply-side* incentives. Some actors may be in favour of a given policy because it provides them with coveted goods, services or economic support, while others are more

interested in its effect in boosting such desiderata as employment, careers, institutional status, or commercial profits. Where demand-side analyses of policy development focus on consumer interests, supply-side studies pay more attention to the provider interests of politicians, bureaucrats, and enterprises involved in public procurement. As demand and supply condition each other, the same policy may of course be of mutual interest to both sides of this equation.

- A fourth distinction frequently made in political analyses is that between *substantive*, *institutional* and *personal* motivations. When particular policy decisions are examined, we may find one analyst emphasising the economic impact of its substantive outcome, another one is more concerned with its effect in affecting the balance between the institutions involved, and a third analyst is more preoccupied with the role of political leadership in bringing about policy changes. Since any of these three perspectives may shed light on the policy process, there is no *a priori* reason to regard them as mutually exclusive.

A common denominator in these examples is the observation that a combination of various goals may be crucial to the attainment of consensus. *Policy-making is not the domain of the like-minded and the single-minded, but a field where actors with different objectives manage to agree on a particular set of rules or course of action*. Yet not all such motives leave traces in the written texts. Some goals are explicitly recognised in preambles and similar statements, while others are given no formal expression. Even if it is obvious to everybody that a given decision is based on the stubborn insistence by one or a few governments and a mixture of solidarity, indifference and compensation expectations exhibited by most of the others, we do not expect to find this background candidly enshrined in the introductory declaration of an act adopted by the Council.

Probing into the multiplicity of objectives is however crucial to understanding the dynamics of European integration. Before dealing with the Charter, let me point at EU structural policy as an interesting illustration of this. Accounting for more than a third of its budget, this is the most extensive field of EU intervention next to the common agricultural policy. The official purpose of EU structural policy is set down in TEC art. 158, which makes it an objective to promote the overall harmonious development of the Community by pursuing actions leading to the strengthening of its economic and social cohesion: “In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions, including rural areas”. The goal

is often summarised as convergence, and indices of economic disparity between regions and member states are used to evaluate its success.[3]

EU structural policy has been subjected to more extensive evaluation than any other policy in world history, but in spite of some obvious progress in convergence particularly between regions, the evidence linking this development to European Union spending is quite tenuous. The *post hoc* is easily established, the *propter hoc* much less so. In some countries and regions where we have seen noticeable progress in the catching-up process, the disparity reduction may well have been influenced less by the structural and cohesion funds than by investments and increasing trade flows stimulated by the four freedoms. Another part of this development may be attributable to secular trends towards inter-regional convergence in advanced market economies, observed also in the United States throughout the last century.

If we have come somewhat closer to the official goal set for EU structural policy, we have therefore scant means of assessing the extent to which this achievement is due to the particular instruments and interventions employed. What is much less contestable is that periodic amendments and additions to EU structural policy have served as an efficient lubricant in European integration at frequent critical junctures in the past. Measures within the flexible framework of structural policy have allowed Member States to solve many conflicts of interest by providing commensurate compensation for losses feared or expected. The resultant combination of support schemes in EU structural policy is well-nigh impossible to grasp without recourse to extensive archaeological excavations through the many different layers of superimposed subsidies.

Today, structural policy with the aim of promoting cohesion remains a cardinal component of the EU agenda, accounting for over a third of its total budget. Though Delors initiated its main expansion by twice doubling its volume, first in the late 1980's and then in the early 1990's, the full history of its evolution spans over four decades and passes through at least *ten political packages,* in which new 'side payments' were introduced through revisions of the rules governing EU regional policy: (1) the early retraining subsidies offered within the European Coal and Steel Community to deal with the closure of the Wallon mines, (2) the creation of the Social Fund to respond to unemployment especially in the Mezzogiorno, (3) the need for a supplement to compensate for Britain's modest returns from agricultural policy on her entry into the Community, (4) the launching of the Integrated Mediterranean Programme to meet concerns in the southern border regions in connection with Spain's and Portugal's accession to the Community, (5) the need for special compensatory measures in favour of the latter countries as well as Greece and ultra-peripheral regions, (6) the request for a fair

[3] European Commission: *Second Report on Economic and Social Cohesion* (2002), available at http://europa.eu.int/scadplus/leg/en/lvb/g24001.htm

distribution of the gains expected from the internal market and compensation for the risks incurred by lagging and monocultural regions, (7) the need to assist poor countries in meeting the convergence criteria for the common currency, (8) the introduction of new rules on sparsely populated areas in connection with the Northern enlargement, (8) the comprehensive budgetary package with various reforms and compensation measures adopted on the basis of the Commission's 'Agenda 2000', and finally (10) the adaptation already undertaken and the further adjustments foreseen in connection with the Eastern enlargement.

If EU structural policy exemplifies a bundle of pay-off arrangements introduced gradually and over a long time-span under the common ideological roof of European cohesion and solidarity, the Charter of Fundamental Rights represents a different and more simultaneous type of goal congestion. Here, we have a policy formulated at one single point in time but pursued for a variety of reasons, by actors inspired by multiple, overlapping objectives.

II. The Itinerary of the Charter: From Cologne to Nice, via Tampere

The Charter of Fundamental Rights was proclaimed solemnly in Nice on 7 December 2000 by the Presidents of the European Council, the European Commission and the European Parliament. This declaration was the result of an unprecedented drafting procedure involving representatives not only of the three aforementioned institutions but also of the national parliaments of the fifteen member states. Although only in a consultative capacity, the Economic and Social Council, the Committee of Regions, the European Court of Justice, the Council of Europe, the European Ombudsman, and the governments of the candidate countries also participated in the process. Furthermore, oral and written contributions had been made by a large number of non-governmental organisations. Among the 350 communications addressed to the drafting body there were also opinions by national institutions, academic experts, and private citizens.

This unusual process had been designed by the European Council at two meetings in 1999. The mandate for the drafting of the Charter was defined in Annex IV to the Presidency Conclusions of the Cologne Council on 3-4 June. The subsequent informal Tampere Council on 15-16 October determined the composition and procedures of 'the Body' that was to be entrusted with the task. This *ad hoc* organ would have 62 members: one representative of the European Commission, fifteen personal representatives of the heads of state and government of the member states, thirty representatives of the national parliaments and sixteen representatives of the European Parliament. The Council was to provide the Secretariat and the Body was to hold its meetings in Brussels, alternating between the two

buildings of the Council and the European Parliament. Former German Federal President Roman Herzog was elected Chairman of the Body, with each of the three contingents (governments, national parliaments and the European Parliament) supplying one Vice Chairman for the Presidium which was simultaneously constituted as a drafting committee with the responsibility for producing successively revised proposals.

The ambiguities of the term 'Body' and its French counterpart 'Enceinte' gave rise to some light-hearted comments; would the body eventually become pregnant with a new constitution? At any rate, neither name survived very long. At the suggestion of the representatives of the European Parliament, the Body at its second meeting decided to call itself 'the Convention'. Clearly, this label with its echoes both of the French Convention of 1789 and the Philadelphia Convention of 1776 was intended to enhance the status of the enterprise and intimate a constitutional mission not explicitly recognised in its mandate. This was hardly the first example in European integration of the recourse to 'auto-rebranding' as a means of boosting the influence of an institution. A previous example is the Consultative Assembly of the Council of Europe which entirely on its own, and without proposing a change in the Statute of the Council of Europe, decided to call itself The Parliamentary Assembly of the Council of Europe. This decision was followed by a long period in which a different terminology was used by the Assembly and the Committee of Ministers in their correspondence, until the latter eventually gave up and accepted the language of the stubborn parliamentarians. In the case of the Convention, however, there was no resistance at all from the side of the Council or the Commission: the new name was immediately accepted, and the term 'Body' disappeared from all public documents.

Why, then, was this entire process set in motion? The explanation offered by the Cologne Council starts by declaring that the protection of fundamental rights is "a founding principle of the Union and an indispensable prerequisite for its legitimacy". It goes on to assert that the obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. On this basis, a topical need is recognised which is also placed in an evolutionary perspective:

> There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.[4]

The mandate goes on to specify the types of rights and the sources to be considered for the drafting of the Charter. It also lays down that a proposal

[4] Available at http://europa.eu.int/council/off/conclu/june99/june99_en.htm

should be ready before the European Council in December 2000. As for the mode of adoption, a first step is indicated in the Cologne mandate with a possible later follow-up:

> The European Council will propose to the European Parliament and the Commission that, together with the Council, they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It will then have to be considered whether and, if so, how the Charter should be integrated into the treaties. The European Council mandates the General Affairs Council to take the necessary steps prior to the Tampere European Council.[5]

With the composition of the Convention defined in greater detail by the Tampere Council, there is something that patently does not gibe in the two 1999 Council decisions. If the sole motive for the Charter was merely the desire to make already existing fundamental rights more *visible* in order to prove their importance and relevance to the citizens, why was this task not entrusted to a small team of experts in public relations and popularisation of legal texts? The high-profile character of the exercise, further underlined by the presence of some prominent statesmen (such as former President Herzog and former prime ministers Vranitzky and Dehaene) among the members of the Convention, seemed to indicate further aims linked to the Charter. And such aims were no doubt present in the minds of those who had taken the initiative and several other members of the European Council. But since there was no universal agreement on these higher ambitions, the Cologne decision emphasised an objective on which the fifteen heads of state and government were able to agree, that of making already existing rights more visible.

III. Underlying Ambitions: The Road to Cologne

To understand the broader goal panorama linked to the Charter it may be useful to make a flash-back, examining its pre-history which spans at least a quarter of a century. The 1970's saw several attempts to commit the European Communities more firmly to the protection of fundamental rights. In a 1970 sentence (Internationale Handelsgesellschaft), the European Court of Justice recognised the European Convention of Human Rights (ECHR) as a statement of the common principles on which Community law was based, together with the Treaties and the constitutional traditions of the Member States. Proposals for a formal ratification by the Communities of the ECHR were advanced both by the European Commission and the European

[5] *Ibid*.

Parliament, but with no success. In 1994, the European Court of Justice (ECJ) was asked to examine the compatibility of an accession to the Convention with the Treaties. According to the 1996 Opinion by the ECJ there was no legal basis for such a ratification.

Meanwhile, several initiatives were taken in the European Parliament to provide the EC with its own catalogue of human or fundamental rights, such as the 1973 Resolution with regard to fundamental rights in the development of Community law, the 1984 Spinelli Report outlining a European Constitution and the 1989 adoption of a 'bill of rights' which, however, was never taken into account by the ECJ.[6] In the Maastricht Treaty, an article was inserted proclaiming that the fundamental rights as guaranteed in the ECHR and as derived from the common constitutional principles of the member states should be recognised as general principles of Community law (art. F, later art. 6 in the Amsterdam Treaty).

The German discussion on this topic was particularly intensive. Ever since the two famous *Solange* sentences by the Supreme Constitutional Court in 1974 and 1986, there had been a strong concern in Germany that the important domestic institution of *Verfassungsbeschwerde* lacked a counterpart at the European level.[7] There was also a desire to reinvigorate the integration process through the elaboration of a full-fledged constitution. In the Bundestag, an early plea for a European Charter of Fundamental Rights was made in 1995 by Jürgen Meyer (SPD), later an active member of the Convention. Meyer argued that fundamental rights create consensus, express common values and thereby contribute to the legitimacy of the political body espousing them. While recognising the importance of the ECHR and supporting its ratification by the EU, Meyer contended that it was incomplete in its coverage and that mere accession to this instrument would be an insufficient step in the right direction.[8]

Other ideas were generated by specially appointed working parties. Following a 1996 Comité des Sages report on Civic and Social Rights, two further reports on human rights were presented in 1998 and 1999. The first one was commissioned by DG 1 A of the Commission (external relations) from a group of four authorities on human rights (A. Cassese, C. Lalumière, P. Leuprecht and M. Robinson) supported by a substantial body of expert papers.[9] This group made a long list of suggestions on how human rights protection could be strengthened within the European Union, including the setting up a special Commission directorate or monitoring centre for this

---

[6] *Die Charta der Grundrechte der Europäischen Union*: Deutscher Bundestag: Zur Sache 1/2001, at p. 9.
[7] BverfGE37, 271 ff.; BverfGE 73, at 339 ff.
[8] Deutscher Bundestag, 13. Wahlperiode, 44. Sitzung, 22 June 1995, at p. 3562 f.
[9] *Leading by Example: A Human Rights Agenda for the European Union* (Florence: European University Institute 1998) and Philip Alston (ed.): *The EU and Human Rights* (Oxford: Oxford University Press 1999).

purpose, but it did not propose the drafting and adoption of a charter. The second report, which was commissioned by DG V and presented by an expert group chaired by Prof. Spiros Simitis, was more drawn to this idea, making the case for a EU Bill of Rights.[10]

German reflections now went in the same direction. In the coalition agreement between SPD and the Green Party on 20 October 1998, a European Charter of Fundamental Rights figured in chapter IX *Sicherheit für alle – Bürgerrechte stärken* under the heading 'EU initiatives'. The German Presidency of the Council in the following semester placed the new coalition in an ideal position to promote this objective, a cause taken up by both Foreign Minister Joschka Fischer and Justice Minister Herta Däubler-Gmelin. Though the Green Party and the SPD were no doubt the prime movers of the Charter within Germany, there was little disagreement on this matter and the three substantial debates in the German Bundestag in 1999 and 2000 demonstrated a far-reaching consensus between all the political parties on the importance of the Charter and the need to integrate it into the treaties as a legally binding catalogue of rights.[11]

IV. Institutional Objectives of the Charter and the Convention

A prominent line in EU studies, sometimes dubbed neo-functionalism, highlights both the self-reinforcing nature of European integration and the entrepreneurial interventions by well-placed functionaries and policy-makers. If earlier research along this line focused mainly on the European Commission and sometimes the European Court of Justice, recent contributions give increasing attention to the efforts of the European Parliament to enhance its political impact.

In disentangling the various motives referred to in connection with the process of drafting the Charter, a first distinction may be made between *institutional* and *substantive* objectives. There is little doubt that the opportunity to boost particular bodies and organisations played some part in gaining support for the exercise. Throughout the course of the deliberations in the Convention, it was obvious that many of the institutional actors invited to contribute to its work welcomed their own role in the process as a recognition of their standing and legitimacy. This was true of the national parliaments which, apart from the COSAC meetings with their very limited impact on EU decision-making, had not previously been called upon to enter the common stage in an official capacity. The Committee of the Regions and the Economic and Social Committee were also given some additional

[10] *Affirming Fundamental Rights in the European Union: Time to Act*, Report of the Expert Group on Fundamental Rights, February 1999.

[11] 28 October 1999, 18 May 2000 and 12 October 2000. Cf. also the eight 'Fraktionsanträge' by the various party groups as reprinted in *Die Charta, supra*, fn. 6, pp. 183–210.

attention. Many NGOs clearly appreciated their expanded access to the policy process through hearings and through the opportunity to make written contributions to the homepage of the Convention. A further group of institutional actors, satisfied with the role accorded to them, were the governments of the candidate countries which, in the first Convention, were only invited to make oral and written presentations. As it turned out, this trial run and the further progress in the negotiation process paved the way for a much more ambitious mode of participation by the candidate countries in the subsequent second Convention.

The observer status granted to the Council of Europe served a somewhat different purpose. In this body, there had long been an apprehension that an EU Bill of Human Rights might imperil the system of legal protection established through the ECHR and the European Court of Human Rights.[12] In the 1990's, this mechanism had become instrumental in the push for legal and institutional reform in Central and Eastern Europe. In joining the Council of Europe, all new member states had undertaken to ratify the ECHR and several of its additional protocols. Bringing all of Europe under this legal umbrella was no mean achievement, and those involved in it were therefore concerned that a new more ambitious instrument might lead to legal uncertainty, divergence between two systems of rights protection and ultimately a new cleavage between different parts of Europe. Involving high-level representatives of the Council of Europe and the Strasbourg Court in the work of the Convention was a way of laying such fears to rest and ensure a smooth co-ordination of the new charter with the prevailing set of standards, including the rich Strasbourg jurisprudence.

To the Commission, accustomed to playing a prominent part in the trio of EU institutions, a single representative in a body of 61 could of course be seen as a step in the wrong direction. But Commissioner Vitorino was assured of a central role in the work of the Convention through his membership in the Presidium and his strong backing by a qualified staff.

From the point of view of the European Parliament, there is no doubt that the very drafting process itself constituted a significant advancement in its long battle with the Council for a greater say in the EU policy process. In the domain of primary law, the European legislature had long been relegated to the sidelines. Member states have more or less monopolised the process of treaty revision, with the governments clearly predominant in the bargaining preceding the landmark decisions in Maastricht, Amsterdam and Nice and the national parliaments given an important role as ratifying instances. The very term "intergovernmental conference" given to these rounds of negotiations testifies to the predominance of government machineries in the process. The European Parliament to its chagrin has never been able to exercise formal

[12] Cf. my articles "Warum das Rad neu erfinden?", *Frankfurter Allgemeine Zeitung,* 8 September 1995 and "One Set of Rights Is Enough", *International Herald Tribune,* 29 September 1995.

influence in these revisions, in spite of its skilful use of pressure through informal channels to advance its positions particularly before Maastricht and Amsterdam. As far as the Nice Treaty was concerned, the European Parliament had its spokesmen in the Intergovernmental Conference but made little headway in enhancing its long-term procedural objectives.

In this perspective, the decision to set up the quadripartite drafting organ and the composition of this body was clearly an important concession by the Council. Though often present and influential in late stages of the legislative process through the various reconciliation procedures linked to its co-decision powers and increasingly represented also in Commission committee structures by virtue of its inter-agency agreements or simply by *ad hoc* invitations, the European Parliament had not previously been involved in any joint drafting procedures of this kind. The Convention was therefore greeted both as an opportunity to influence a particularly important piece of 'soft law' – soon to be hardened, it was hoped – and as a precedent for later exercises in constitutional development. The presence of the national parliamentarians in the process was perhaps not to the liking of all MEPs but was a low price to pay for this important implicit recognition of the role of the European Parliament in any future revision of the Treaties. Having taken this step once, it would be difficult for the Council to turn back to its old methods of preparing an IGC entirely on its own, as indeed confirmed by the Laeken decision on a new Convention.

To sum up, the very setting up of the Convention was well in tune with the institutional aspirations of many different bodies, both statutory and informal. The broad scene established for deliberations on European fundamental rights provided an opportunity for many actors to have their say and to assert their presence in European policy-making. As for the Charter itself, its institutional implications were less obvious. The only organ that would be significantly strengthened by the introduction of fundamental rights, the European Court of Justice, kept a very low profile throughout the deliberations of the Convention.

V. The Substantive Objectives of the Charter

The substantive functions refer to the perceived effects of the Charter rather than those of the Convention. What purpose is served by this instrument? From the extensive discussions on the Charter at the eighteen plenary meetings of the Convention, the 350 contributions registered at its website and the many wide-ranging political and the academic comments on the enterprise that I have had an opportunity to study, I would suggest that at

least six different reasons for the enterprise may be discerned.[13] The categories are partly overlapping and the list is not necessarily exhaustive, but the merit of this catalogue is at least to illustrate the wide variety of objectives linked to the undertaking.

A) The Charter as a Means to Make Fundamental Rights More Visible

The principal argument for the Charter suggested in the Cologne mandate is enigmatic in several ways. A first question already broached is why such an aspiration, if genuine, should not ideally have been handled by a competent public relations agency rather than a cast of several hundred politicians and political counsels. A second question refers to the ulterior motives behind the objective. Why, exactly, is it good thing to make already existing rights more visible?

Of several possible answers to that question, some are linked to the role of fundamental rights per se while others are more related to the legitimisation of the European project. Some of the rights ultimately included in the Charter were not particularly invisible at all since they were easily accessible in the European Convention of Human Rights (ECHR). Others stemmed from the Treaties while a third category, admittedly, was less discernible for citizens not steeped in the secondary law of the jurisprudence of the European Court of Justice (ECJ) and the Social Charter of the Council of Europe. Bringing together these rules might arguably give European citizens a better grasp of the normative system already in place.

But was such a wish for legal enlightenment really the principal reason behind the Cologne mandate? One need not scratch very deep in this wording and in the preceding pleas to find a different sub-text. The desire for greater visibility of fundamental rights seems very closely linked to the desire for greater attachment of the Europeans to the process of integration. With low participation in the European elections and weak support for EU institutions constantly reported by the periodic opinion polls, a continuing concern among European leaders remains the weak popular underpinnings of their efforts. In the standard diagnosis of this condition, Europeans are still unable to make out what the EU means to them and in what way its actions and rules affect their daily lives. Hence a great need to bring home the message of an EU that makes a difference. At a close reading, this is exactly what the Cologne mandate says: it is not really the fundamental rights that are to be made more visible but rather "their overriding importance and relevance".

[13] The contributions are available at the Council website, http://db.consilium.eu.int/df/default.asp ?lang=en.

B) The Charter as a Means to Increase Legal Certainty

A motive frequently cited during the proceedings of the Convention was that of clarification. With the fundamental rights dispersed over a large number of legal instruments with varying formal status and territorial coverage, a measure of ambiguity would always remain as to the validity of particular norms. This would best be remedied through the creation of a single legal text defining the fundamental rights of EU citizens.

While the goal of increased legal certainty was generally acclaimed, a concern often voiced referred to the risk of the opposite effect inadvertently being achieved through the multiplication of catalogues of fundamental rights in national constitutions, the EU Charter, the Treaties and other EU legal texts, and the ECHR. A sequel to this might be different nuances in the jurisprudence of the two Courts. This argument led to the adoption of article 51 in the Charter, as a safeguard against divergent interpretations.

Concern was also expressed about potential collisions between European and national law. There was initially considerable disagreement in the Convention regarding the coverage of areas where the Communities or the Union have very limited competence. Should such rights be included in the interest of completeness, or excluded in recognition of subsidiarity? The compromise eventually reached extended the list of rights to some such fields, introducing a variety of references to domestic legislation such as the formula concluding art. 14 on the right to education: "in accordance with the national laws governing the exercise of such freedom and right". The intention not to trespass on territory not covered by the Treaties was also underlined through the prescription in art. 51 that the provisions of the Charter are addressed to the Member States "only when they are implementing Union law". Since the Charter could not confer new authority on the Union, the underlying message of this stipulation was to say that the EU should take great care not to prevent measures by the Member States intended to safeguard the exercise of the various rights.

As long as the Charter remains a solemn declaration, this article seems well suited to served its purpose. But if the Nice Declaration is incorporated into or appended to a new Constitutional Treaty, there will be a problem of 'reflexive law' not dealt with by the Convention. As soon as all articles of the Charter by themselves become part of the EU corpus of legislation, the references to national laws and practices may no longer exonerate Member States from a strict adherence to the rights recognised in the Charter. When that happens, the domain of Union law would presumably expand to include the entire Charter, and many more activities by Member States would *eo ipso* be subsumed under the implementation of EU legislation.

C) The Charter as a Means to Extend the Scope and Range of Fundamental Rights

Dealing with a vast spectrum of civil, political, economic and social liberties, the Convention was quite naturally thrust into a whole range of on-going political disputes about the limits and implications of particular rights. In these discussions, the voices of prudence often recalled the restrictions set down by the European Council which, in its Cologne Mandate, had expressly asked the Convention to confine itself to already existing freedoms. The bold innovators took a different tack, emphasising the indispensability of the various contested rights for a decent European society. Several participants chose the conservative line as their home base from which they might sometimes make targeted forays into the opposite camp when their own key priorities appeared on the agenda.

Many NGOs and lobby groups made their own energetic contributions to these discussions, frequently intervening only on one or a few articles of particular concern. For these organisations, the Convention seemed to serve as an omnibus that might advance causes long fought for. Among the articles attracting intense attention from such quarters, one may mention art. 17 dealing with the definition of property and the right to compensation in the context of expropriation (attracting the attention of i.e. the European land-owners, articles 2 and 3 on the right to life and the right to the integrity of the person (prominent in contributions from religious organisations), art. 37 on environmental protection (engaging a variety of green advocates) and the whole range of social rights in chapters III and IV (strongly emphasised by the European trade unions and affiliated bodies).

The extent and impact of these initiatives remain to be examined in detail. What was clear already at the Convention was the high degree of interaction between NGO spokespersons and various members of the Convention, basically following the expected political patterns. As a member of the Convention representing the Swedish government, I was personally contacted by at least a dozen different organisations pleading for or against the proposed wording of different articles. Many of my interlocutors, and an even greater number of those sending written letters, made a point of reminding me of previous Swedish commitments and of binding international instruments that ought to be taken into account in the drafting of the Charter.

D) The Charter as a Means to Influence On-going Policy Debates Within the EU

At any given point in time, the Member States of the EU are at loggerheads on a vast array of topical issues. On many others, they disagree not so much in substance as on their salience and importance. Inevitably, a certain amount of shadow-boxing on such questions took place in the Convention, and in a

few cases positions defended by individual or only a few countries left their mark on the Charter.

Some examples may illustrate this tendency. France strongly insisted on the insertion of Art. 36 making the access to services of general economic interest a fundamental right, as part of its campaign to resist the liberalisation of certain utility markets. Less successful Austrian suggestions to give explicit recognition to minority rights were widely interpreted to be a riposte to the French-led coalition of 14 Member States that had instigated a partial boycott of the Austrian government following the formation of the ÖVP-FPÖ coalition. Swedes had some success in pressing for an article on the rights of the child (art. 24) while Finns won acceptance for the inclusion of articles on the environment (art. 37) and the right to good administration (art. 41).

E) The Charter as a Means to Shift Priorities Within the EU

Beyond such specific issues, some members of the Convention saw the exercise as an occasion for more substantial shifts in the essence and orientation of the European Union. A purpose frequently pinned to the Charter was that of making it clear beyond any doubt that European integration had goals beyond the pursuit of prosperity and material welfare. The peace motives of its founding fathers were often invoked but also the need for comprehensiveness, cohesion and common values. This position was most eloquently expressed in German where alliteration added to its pregnancy: the European Union was not only about *Wirtschaft und Währung* but also about *Werte*.

In a slightly different version suggested principally from the left side of the Convention, the Charter would be an excellent opportunity to express more clearly the need to combine the economic freedom and free competition elements of the Union with a solid commitment to social values. This would require a substantial repertory of social rights in the Charter. As might be expected, suggestions in this direction were particularly frequent from the left side of the Convention, with some support also offered by centrist politicians and by champions of the federalist cause. Others, including the Brits traditionally sceptical of this approach, defended a more limited selection of fundamental rights emphasising the traditional civil and political liberties. The final outcome was a compromise between these two positions, going further in the social direction than some members would have wanted but not as far as requested by others.

The position I personally defended on this matter reflected two deep-seated convictions. On the one hand, Nordic countries are profoundly committed to an ambitious welfare state and to many practical manifestations of solidarity. In this respect, they certainly support the notion of a European social model. Yet an important element in the Nordic version of this model is the strong insistence on local and regional self-government not only in the

implementation but also in the micro-design of particular services. Since substantial sacrifices by the tax-payers are required to keep the wheels of the welfare state in motion, there is a strong need to defend its legitimacy by maintaining considerable low-level influence over its various subsystems. Referring too many decisions concerning social arrangements to high-level institutions and judiciary instances may undermine the public support required to sustain the welfare state.

F) The Charter as a Stepping-stone to a European Constitution

To many of its participants, the first Convention was mainly a trial run for the second one. The mandate they would have preferred would have been a licence to draft a Constitution for the European Union, but that was not the instruction given at Cologne. *Faute de mieux*, the Charter could at least be seen as a key chapter in a future European Constitution. This perspective on the mission entrusted coloured both the deliberations of the Body and the Preamble introducing the Charter. The Convention was energised not so much by the task conferred upon it as by the purpose it anticipated being able to serve.

In retrospect, the Convention was perhaps quite justified in this assumption. But it had to act in a situation in which the Member States were not yet ready to give a more explicit mandate. Dealing with this situation it was much helped by the 'Kantian approach' launched by its Chairman, former Federal President Roman Herzog. Unable to reconcile the two competing ideas of the Charter as either the political declaration requested by the Cologne mandate or the legally binding chapter of a future constitution not yet agreed upon, Herzog suggested that the text should be written 'as if' it could be elevated into general law. This was obviously a somewhat licentious interpretation of Kant's suggestion in *The Critique of Practical Reason* that every single action of the individual should be based on generally applicable principles.[14]

At Nice, the European Council and the Presidents of the European Commission and the European Parliament adopted the Charter as a solemn declaration, inserting the question of its future status into the list of four issues to be dealt with by the next Intergovernmental Conference.

[14] "Handle so, dass die Maxime deines Willens jederzeit zugleich als Prinzip einer allgemeinen Gesetzgebung gelten könne."

Conclusion

In observing the EU policy process, one is often reminded of the old formula *two-speed Europe*. On many occasions the pace is exceedingly and excruciatingly slow, with conflicting interests and member states blocking the road to common solutions. But there are also periods of acceleration and hectic spurts. The quick passage of a number of previously stalled proposals for framework decisions in the field of common security after September 11, 2001, illustrates the capacity for fast-track politics in the Union.

The Charter of Fundamental Rights was another such case, worked out and adopted at a speed that left many lawyers in the national capitals panting for breath. Some of its remaining internal contradictions may be attributable to the compressed character of the process. But many others are more linked to the phenomenon of goal congestion. Neo-classical management theory, with its emphasis on clear and measurable objectives, may be well adapted for the handling of public and private organisations, but it is much less applicable to political processes in which actors have many different sets of preferences. In the complex fabric of the European Union, we had better get used not only to multi-level governance but also to policies designed to serve many different objectives.

Chapter 9

'Rights to Solidarity' Balancing Solidarity and Economic Freedoms

Agustín José Menéndez

> Everyone has those entitlements as social constitutional rights which from the perspective of constitutional law are so important that their granting or non-granting cannot be left to simple parliamentary majorities.[1]

Introduction

'Rights to solidarity' is a rather new expression, recently coined in the Charter of Fundamental Rights of the European Union. In this chapter, the term will be used to refer to the social and economic rights that are included in Section IV of the Charter, together with some other social rights that are included in other sections of the Charter.[2] The basic question that will be posed in this chapter is: what does the Charter have to say about the tension between social values and market freedoms within the European Union? Does the Charter favour the four economic freedoms, or does it contain provisions that may enhance the prospects for realising the basic social European values, as embodied in the welfare systems of the Member States?

The first section of this chapter establishes the context in which the Charter was elaborated. European integration has been marked by a certain imbalance between market-making (usually referred to as *negative economic* integration) and market-redressing (that is, social regulation aimed at framing markets, and eventually rectifying its distributive outcomes). This is especially striking given that all present Member States are mature *welfare states*, characterised by a balance of market-making and market-redressing at the core of their socio-economic structures. The second section aims at making legal and normative sense of the provisions on 'rights to solidarity' contained in the Charter. The specific status of rights to solidarity, but also of the right to private property, is considered. The Charter reflects the present imbalance within European integration; the literal tenor of the provisions of

---

[1] Robert Alexy: *A Theory of Constitutional Rights* (Oxford: Oxford University Press 2002), p. 343.

[2] On the adequacy of the expression (whether it makes sense to take of *rights* to solidarity, or whether solidaristic behaviour must be, by definition, spontaneous, non-legally coerced, I (embarrassingly) refer to my "The Sinews of Peace. Rights to solidarity in the Charter of Fundamental Rights of the European Union", forthcoming in *Ratio Juris*, 16 (2003) September.

social rights is weaker than that of the right to private property. However, a contextual interpretation of the provisions of the Charter reveals that social policies might be reinforced, not weakened, by the Charter. Thus, 'rights to solidarity' might be affirmed as *the* canon of arguments that justify curtailing economic freedoms. The third section deals with the role of social rights in the process of constitution-making. The final part holds the conclusion.

I. The Context: Not-so-social Europe

As is well-known, European integration has led to the creation of a 'common' economic market, underpinned by the famous four economic freedoms: free movement of workers, capital and goods, plus freedom to provide services.[3] In addition, monetary policy has been 'federalised' in twelve of the fifteen Member States. In legal terms, it is not too far-fetched to say that the regulatory framework pertaining to all productive factors is already established at the European level (even if this is further regulated by national laws).

Economic integration, one might venture, could be said to have helped to foster the national protection of social rights, insofar as peace and growth are the main preconditions for the welfare state. The latter were rendered possible by European economic integration. Such a claim seems to be confirmed by the fact that, at the very least chronologically, the fostering of supranational markets came hand in hand with the affirmation of national social rights.[4] However, one must keep in mind that European integration has not *resulted* in any direct and substantive attribution of competence to the Union to protect social rights, leaving aside some limited measures which were regarded as the flip side of market integration.[5] To put it bluntly, *the creation of a common market has not come hand in hand with the competence of the European Union to develop social policy measures*. Such an imbalance constitutes a risk for the further development of, or even maintenance of, national social policies. Market-making at the European level and social protection at the national level, perhaps once mutually reinforcing, have become conflicting objectives.

This state of affairs has not always been welcomed by all Europeans. All episodes of economic recession since the oil crises of the 1970s testify to

---

[3] This does not mean, quite obviously, that all barriers to trade have been got away with. Not only there remain obvious barriers resulting from the lack of coordination of tax systems, but the preservation of the system of sales taxation at source seems to result in an administrative burden equivalent, in average, to 5% of the value of traded goods. See Ernst Verwaal and Sijbren Cjnossen: "Europe's New Border Taxes", *Journal of Common Market Studies*, 40 (2002), pp. 309–330.

[4] See the second chapter of this book, section 1.

[5] A contemporary account in E. D. Brown, "Recent Developments in the Social Policy of the European Economic Community", *Common Market Law Review*, 3 (1965/66), pp. 184-214.

the rather undefined but increasingly intense calls for a more balanced approach to European integration, for some kind of 'social European policy'. Social pressure has had its limited, but far from negligible effects on Community law. The short, but existing *acquis communitaire* on social standards has been established at such critical turning points: the economic crisis of the 1970s, the stagnation of the mid 1980s, and the recession of the mid 1990s. Two main achievements should be referred to here. First, the Social Charter, which includes a set of rights for 'workers', was approved in 1989. However, British opposition resulted in it being confined to the status of a political declaration, and, more to the point, made it impossible to develop European policy measures aimed at rendering the said rights effective. Second, the Treaty of Amsterdam inserted an Employment Title in the Treaty of the European Communities. This resulted in an open but weak grant of social competences to the Union. Several informal processes of co-ordination have resulted from it, among which the rather fashionable 'Open Method of Co-ordination' (OMC).

Still, all this amounts to is a rather weak competence of the Union on social matters. As a result, there remains a tension between market-making and market-redressing. On the one hand, the legal framework applicable to most of the 'productive factors' is determined by Community law, and given the *supremacy* of the latter, has *de facto* become inscribed in the constitutional law of each Member State. On the other hand, social protection remains a national competence, and without a proper normative sheltering at the European level. The perils involved in this situation are, if anything, increasing. The dynamics of the common market leads to factual and legal challenges to the economic, social and legal basis of the welfare state. As the law stands, freedom of establishment and free movement of capital allow entrepreneurs to *fish* for lower social standards around the Union. The well-known episodes of Hoover moving from Dijon (France) to Scotland is illustrative of the extent to which 'lower production costs' can be based on 'lower social costs', and the extent to which a pressure to reduce social standards might derive from the referred two economic freedoms.[6] Similarly, the recent closing down of Metaleurop illustrates the extent to which the exercise of economic freedoms can be instrumental in escaping social provisions.[7] In brief, without *European* regulatory disciplining forces on capital, there is no longer a guarantee that higher social standards would not lead capital to either *escape* from a given state or region or to factually undermine social standards. As a consequence, the lack of a robust *social dimension* in the European project might lead to active social dumping, especially in the aftermath of enlargement. This is so due to the wide

[6] "Le dumping social à la mode européenne", *Le Monde*, 28 January 1993.
[7] "Comment Glencore a peu à peu dépecé Metaleurop", *Le Monde*, 1 March 2003.

disparity of productivity rates, and social protection standards within the Union. [8]

Such a context made the inclusion of social rights in the Charter deeply controversial to some, while to others it was simply unavoidable. The mandate from the Council stated that:

> In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union.

This was sufficiently ambiguous to be interpreted by some as evidence that social and economic rights should not be included *on a par* with civil and political rights. In fact, the Charter Convention[9] spent a good deal of its time discussing whether and how to include social and economic rights in the Charter.

The main arguments of those who were sceptical of the inclusion of social and economic rights appear to be three. First, their inclusion was interpreted as leading to an expansion of the competencies of the European Union in the area of social and economic policy. Those who opposed the expansion of EU competencies also opposed the inclusion of social and economic rights.[10] Second, affirming social and economic rights was said to reinforce the judiciary. Courts and not parliaments would determine the shape

---

[8] Jacques Le Cacheux, "Social Protection, Tax and Social Competition in the European Monetary Union", paper presented at the Instituto Elcano, Madrid, 3 March 2003, p. 9 : "In a context of high unemployment, recourse to tax competition is likely to appear particularly attractive, insofar as tax reductions or rebates are usually regarded as 'supplier-friendly' tools to stimulate domestic economic activity". Social dumping is even encouraged by some scholars. See Ansgar Belke and Martin Hebler, "Towards a European Social Union: Impacts on Labour Markets in the Acceding Countries, *Constitutional Political Economy,* 13 (2002), pp. 313-335.

[9] As it was already explained in this book, the Presidency Conclusions of the Cologne European Council called upon a 'body' to draft the Charter of Fundamental Rights. The 'body' quickly renamed itself a 'Convention', a term with clear constitutional connotations, even if the concrete connotations vary from country to country.

[10] In general, see Xenophon Yataganas: "The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union – A Continental Perspective", *European Law Journal*, 7 (2001), pp. 242–291, at p. 266.

and the contours of social and economic rights.[11] Third, and finally, ideological preferences should be taken into account.[12]

At the end of the day, social and economic rights were inserted in the Charter.[13] Thus, it seems that those affirming the principle of the indivisibility of fundamental rights, characteristic of the *common constitutional traditions*, were able to make their arguments prevail. In the next section, I will consider the concrete terms in which rights to solidarity are included in the Charter.

II. The Status of Rights to Solidarity in the Charter

In this section, the status of rights to solidarity in the Charter is considered. I will also review the position granted to the right to private property. This will provide us with an adequate point of comparison, given the fact that the right to private property is the ground basis of the market-making dimension of European integration.

A) A Typology of Legal Positions in the Charter

A close look at the provisions of the Charter reveals that not all rights are granted equal status. A certain degree of elaboration of the system of fundamental rights can be constructed through a close reading of the text.

a) Fundamental Rights Proper

Among rights statements, those that provide individual citizens with a shield or a sword *vis-à-vis* ordinary statutes (either secondary Community legislation or national laws) must be characterised as fundamental. These rights not only constitute an institutional embodiment of substantive moral claims, but are also given the form of individual claims that could be used against the action of the ordinary legislator.

---

[11] Lord Peter Goldsmith Q.C.: "A Charter of Rights, Freedoms and Principles", *Common Market Law Review*, 38 (2001), pp. 1201–1216, at 1212: "[T]he stance one takes on the justiciability of socio-economic rights depends to a large extent on one's theory and understanding of democracy."

[12] This was further corroborated by the discussions in Working Group II of the Laeken Convention, on the question as to whether the Charter of Fundamental Rights should be incorporated in Community law. UK and Ireland were the only countries opposed to such an inclusion.

[13] See "Contribution and Intervention by Lord Goldsmith", CHARTE 4122/00, available at http://db.consilium.eu.int/dfdocs/EN/04122.EN.pdf and "Contribution on the Structure of the Draft Charter by Lord Peter Goldsmith", CHARTE 4428/00, available at http://db.consilium.eu.int/dfdocs/EN/04428.en0.pdf.

Clear examples are Article 2, paragraph 2 ("No one shall be condemned to the death penalty, or executed"), Article 7 ("Everyone has the right to respect for his or her private and family life, home and communications"), or Article 39, section 1 (right to vote in European elections).

Whether it is openly stated or not, the characterisation of a right as *fundamental* does not imply that ordinary legislators cannot *regulate* such a right. In a way, the proper way of respecting a fundamental right is to *make it positive*, and to determine the means for its protection. This is clearly reflected in Article 51, section 1, first sentence: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and *respect the essence of those rights and freedoms*." This provision reflects the *common constitutional traditions* of the Member States on which Community law rests.[14]

It is in such a light that we have to interpret references such as the one contained in Article 3, section 2, first sentence (right of the patients to informed consent before being subject to medical or biological treatment). The referred provision acknowledges the right "according to the procedures laid down by law". Such a reference does not imply full discretion to the ordinary legislator, but it implies a mandate to respect the *essence* of the right.

b) Ordinary Rights

Some other rights statements are of a dubious *fundamental* nature. This is the result of the interplay of Article 51 and a series of clauses that refer to national legislation to determine the substantive content of the right.

Some legal statements contained in the Charter end up in one of the following clauses: "under the conditions established by national laws and practices",[15] "in accordance with the national laws governing the exercise of such freedom and right",[16] "in accordance with the general principles common to the laws of Member States"[17] or "in accordance with Community law and national law and practices".[18]

Such clauses do not seem very different from the ones associated with a mandate to the national legislator to respect the *essence* of the right when proceeding to its regulation. However, the question is complicated by

[14] Similar implications have other clauses such as "in accordance with the Treaty establishing the European community".
[15] Article 35 (health care).
[16] Article 9 (right to marry and found a family), Article 10 (right to conscientious objection), Article 14, section 3 (freedom to found educational establishments).
[17] Article 41, section 3 (right to good administration; making good damages), article 45, section 2 (free movement of nationals of third countries).
[18] Article 16 (freedom to conduct a business), Article 27 (workers' right to information and consultation with the undertaking), Article 28 (right to collective bargaining), Article 30 (protection in the event of unjustified dismissal), Article 34, sections 1, 2 and 3 (social security and social assistance).

the *division of competencies* between the Union and its Member States. To the extent that such clauses reflect a lack of competence of the Union as law stands, they constitute a reiteration of the basic principle contained in Article 51, namely, that the Charter should not be read as expanding the competencies of the Union to the detriment of the Member States. This might be taken to mean that the fundamental legal statements qualified by such clauses cannot be read as imposing constraints on national legislators different from those contained in their own constitutional law. But were that so, the legal statements included in the Charter would not increase the bite of the referred rights, as they would not add anything to the arguments which individuals could make before courts in order to have legislation set aside in the name of rights.

c) Policy Clauses

Moreover, not all fundamental legal statements give rise to *fundamental* rights. We can find norms that require public institutions to achieve a certain objective or goal, but without giving direct rise to any subjective fundamental position,[19] basically rights on which they can stand before courts. Although a more refined analysis could establish also different types among them, we could use the general term 'policy clauses' to refer to such normative positions.

Some examples from the Charter are: Article 11, section 2 ("the freedom and pluralism of the media shall be respected"), Article 25 (at least as formulated: rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life), Article 26 (protection of the disabled), Article 37 ("a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development") or Article 38 ("Union policies shall ensure a high level of consumer protection").

The same argument made in relation to *ordinary rights* can be repeated here. To the extent that the *policy clause* is coupled with a clause that reiterates the division of competencies between the Union and its Member States, it does not have any bite *vis-à-vis* national legal systems. This means that it cannot be invoked as a ground to review the adequacy of national legislation.

---

[19] CHARTE 4414/00, submitted by the representative of the Spanish government, Mr. Rodríguez-Bereijo, seems to have heavily influenced the drafting of social rights. The three-fold typology between fundamental rights, ordinary rights and policy clauses was proposed there. But see also *For a Europe of civil and Social Rights*, Report by the Comité des sages (Brussels: European Commission 1996), pp. 51 ff. ("Rights in the form of objectives to be achieved").

B) The Status of Rights to Solidarity

a) Rights to Solidarity

Not all rights to solidarity are recognised in the Charter as fundamental rights. If one looks for a pattern, one should have resort to the two-fold distinction between rights to solidarity pertaining to citizens and residents, as opposed to those rights to solidarity where the right-holder is the worker or would-be worker.[20] While most *work-based* rights to solidarity are granted the status of fundamental rights, most *universalistic* rights to solidarity are formulated either as ordinary rights, or as policy clauses.

Among the latter, only the right to education and to the well-being of children (Article 24, first sentence) are qualified as fundamental rights. Most other rights are formulated as ordinary rights. Finally, the rights of the elderly, the disabled, consumer protection, and human health protection are conveyed through policy clauses.

Table I. Typology of *Universalistic* Rights to Solidarity

Name	**Article**	**Type**
Right to education	14, first and second sentences	Fundamental Right
Rights of Children (well-being)	24, first sentence	Fundamental Right
Right to social security benefits	34.1	Ordinary right
Right to social security benefits when exercising free movement of persons	34.2	Ordinary right
Right to social and housing assistance	34.3	Ordinary right
Preventive health care	35.1	Ordinary right
Access to services of general economic interest	36	Ordinary right/ Policy clause (social and territorial cohesion of the Union)
Rights of the elderly	25	Policy Clause
Rights of the disabled	26	Policy Clause
High level of human health protection	35.2	Policy Clause

[20] On the one hand, *work-related* rights presuppose a worker or would-be-worker as rights-holder. This reflects both the *historical origin* of such rights and the *ethical choice* made in certain European welfare states. This is the case with the right to work (article 15), the right to equal treatment of men and women (article 23), the right to fair and just working conditions (article 31), the right to collective bargaining and action (article 28), to information and consultation with the undertaking (article 27), the right to protection in the event of unjustified dismissal (article 30) or the right to special protection of working mothers (article 33, section 2). On the other hand, some other rights are formulated in *decommodified, universalistic terms*, i.e., their rights-holder is the permanent resident, no matter what are its economic circumstances. That is the case of the right to education (article 14), the rights of children (article 24, first sentence), the rights to social security and social assistance (article 34), the right to health care (article 35), the right to environmental protection (article 37) the right to access to services of general economic interest (article 36), the rights of the elderly (article 25) and the rights of the disabled (article 26).

Most of the rights to solidarity, the holder of which is worker or would-be-worker, are granted the status of fundamental rights. It is interesting to notice that in such cases, rights tend to be located, not in Chapter IV of the Charter ('solidarity'), but somewhere else. Such is the case of the right to work, the freedom to choose an occupation, and the right to equal payment.

Table 2. Typology of *Work-related Rights to Solidarity*

Name	Article	Type
Right to Work (stressing opportunity aspects)	15, sections 1 and 2	Fundamental Right
Right to Work of third country nationals (stressing opportunity aspects)	15, section 3	Fundamental Right
Equality between men and women	23	Fundamental Right
Reinforced protection of mothers	33, section 2	Fundamental Right
Collective bargaining and action	28	Fundamental Right
Access to placement services	29	Fundamental Right
Working conditions respecting health and safety at work	31, section 1	Fundamental Right
Prohibition of Child Labour and protection of young people at work	32	Fundamental Right
Limited working hours and paid holidays	31, section 2	Fundamental Right
Workers' right to information and consultation within the undertaking	27	Ordinary right
Protection in the event of unjustified dismissal	30	Ordinary right
Protection of the family	33, section 1	Policy Clause
Consumer Protection	38	Policy Clause

b) The Right to Private Property

Article 17 (1) of the Charter deals with the right to property. It reads:

> 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated in so far as is necessary for the general interest.

Three main substantive contents can be distinguished.

First, Article 17 (1) presupposes that the ordinary legislator would introduce a *private property* regime ("her lawfully acquired possessions"). This *institutional guarantee* constitutes an implicit recognition of the *legal* and *human-made* character of property as an institution. Property is created by a system of common action norms regulating the acquisition and transfer of economic resources, and not merely *acknowledged* as a pre-legal reality. The reference to lawful acquisition invites the interpreter to consider the whole legal system and not only the provisions on private property in order to test the lawful character of the acquisition (this is probably motivated by the reference to the First Protocol to the ECHR to the securing of "the payment of taxes or other contributions or penalties").

Second, Article 17 (1) imposes constraints on the action of the ordinary legislator when dealing with *acquired* property rights; the essential content of the right to "own, use, dispose of and bequeath" must be respected.

Third, the right to private property is basically identified with a stake in the *economic value* of the possession, more than with what is actually owned. The *takings* clause allows public institutions to *regulate* private property as far as is necessary for the 'general interest', but with the obligation to compensate if publicly aimed regulation amounts to deprivation of the economic substance of the right to private property.

A literal interpretation of Article 17 leads to the conclusion that the right to private property is entrenched in the Charter as a *fundamental right (including the right to bequeath property*), not as an ordinary right. This contrasts with the ordinary status attributed to the freedom to conduct a business (Article 16) and the right to intellectual property (Article 17, section 2).[21]

Table 3. Typology of Private Property Related Rights

Name	Article	Type
Private property	17	Fundamental Right
Freedom to conduct a business	16	Ordinary right
Freedom to found educational establishments	14, section 3	Ordinary right
Intellectual property	17, section 2	Ordinary right

[21] Alberto Lucarelli, in Raffaele Bifulco, Marta Cartabia and Alfonso Celotto: *L'Europa dei Diritti, Commento alla Carta dei diritti fondamentali dell'Unione Europea* (Bologna: Il Mulino 2001), pp. 139 ff., notices that a purely literal interpretation of Article 17 would lead us to conclude that the Charter affirms the right to property in a 'pre-democratic fashion, that is, as a a civil right, not as a socio-economic right. The protection of the 'individualistic' element of private property would seem to prevail over the 'socio-economic' constrains upon the right. A more systematic interpretation leads to a different conclusion. However, such a 'divorce' between literal and systematic interpretation reveals the inadequacy of the drafting of Article 17. I will deal with this in some more detail in the following pages.

c) The Imbalance Between Market-making and Market-redressing; How Serious?

A literal reading of the Charter allows us to conclude two things. First, that social rights have been included in the Charter along with *civic and political rights*. Second, that the right to private property has been formulated as a fundamental right proper, while this is not the case with most rights to solidarity. In most cases, social rights are stated as principles or ordinary rights. Thus, the literal tenor of the Charter reflects the imbalance between market-making and market-redressing which has characterised European integration.

However, a further contextual analysis of the Charter requires the qualification of such a conclusion. This is so for two main reasons. First, the Charter as a whole, and consequently also its provisions on social rights and on the right to private property, have to be interpreted systematically, and coherently with the main sources of Community law on fundamental rights protection (i.e., with adequate attention to the international treaties and the national constitutions, the jurisprudence of the European Court of Justice, the European Court of Human Rights and national constitutional courts). Second, the proper balance between the right to private property and social rights has to be struck with explicit reference to the *acquis communitaire* on the right to private property. These two criteria of interpretation are further considered, in reverse order, in the next two sub-sections.

aa) A Contextualised Balance Between Social Rights and the Rights to Private Property

As has been argued, the Charter must be regarded as a consolidation of positive Community law.[22] This implies a mandate to construct its provisions in line with the *acquis communitaire*. The proper balance between social rights and the right to private property should be established after a 'contextualisation' of Article 17 of the Charter.

First, the right to private property is not granted the status of fundamental right in an unconditional or unlimited way. Judgments on cases such as Nold,[23] Hauer[24] or the Banana saga,[25] have clearly established that the *social function* of property renders acceptable the regulation of agricultural

[22] See chapter 2 of this book.
[23] Nold KG v. Commission (Case 4/73) [1974] ECR 491.
[24] Hauer v. Land Rheinland-Pfalz (Case 44/79) [1979] ECR 3727.
[25] Germany v. Commission (Case C-280/93) [1994] ECR I-4873 and Atlanta Fruchthandelsgesellschaft mbH v. Bundesamt fûr Ernährung (Case C-466/93) [1995] ECR I-3761.

production and markets in the framework of the Common Agricultural Policy.[26] Thus, and in line with the *common constitutional traditions*, the protection afforded to the right to property is limited by the scope of other fundamental rights and values. Therefore, it is to be doubted that the conferral of the status of fundamental right to private property implies a consequent constraint on the scope of public action in terms of regulation of the economy and redistribution of resources.[27]

Second, we should consider the *scope* of the right to private property. It is far from obvious that an overly strict interpretation of Article 17 can find support in Article 1 of the Additional Protocol to the European Convention on Human Rights, which deals with property.[28] Not only the *social* function of property is more clearly stressed in the Protocol, but there is also no reference to the right to bequeath, for example. Moreover, Article 295 TEC (ex Article 222 TEC) reads: "[T]his Treaty shall in no way prejudice the rules in Member States governing the system of private ownership." It is clear that membership of the Communities implies compliance with the basic market freedoms, so it could only hypothetically be possible to become or remain a member and introduce a high degree of socialisation of property. Article 295 TEC makes it clear that *market-making* should not be seen as incompatible with the *social* conception of private property that is entrenched in several national constitutions, as we have just seen. Therefore, Article 295 TEC must be read as a *limit* on the impact of Community law upon national law, with direct bite in the area of *shared competencies*, but with widespread implications. The way in which Member States define 'property' must be respected; this, one could argue, can only be done if a *compatible* definition of the right to private property is entrenched in Community law.

---

[26] In this respect, it is interesting to notice that a good deal of the dealing cases on the right to private property decided by the European Court of Justice originated within the German legal system. This is to be explained by the fact that the 1949 Fundamental Law stands out as one of *formalistic* ones among the post-war constitutions. See Alexy, *supra*, fn. 1, p. 483.

[27] The status of private property as a legal and not fundamental right would have an impact upon the capacity of public institutions to pass laws with a clear redistributive impact. The rise of private property to a fundamental status will be translated into a reduction of the threshold to be overcome in order to get access to compensation. See the related argument of Bruce Ackerman, *Private Property and the Constitution* (New Haven and London: Yale University Press 1977), p. 60.

[28] According to the explanatory memorandum of the Charter, the main source of Article 17 is Article 1 of the Additional Protocol to the European Convention, where one can read the following:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

This cautious interpretation of Article 17 seems to pervade the reasoning of Advocate General Geelhoed in *American Tobacco*.[29] The Advocate General was required to render her opinion on the compatibility of a Directive regulating the contents of tobacco on sale within the Union, but also the actual contents of tobacco manufactured within the Union. The plaintiffs challenged the Directive on several grounds, among others, the infringement of the right to private property. The Opinion is worth quoting at length:

> Article 17 of the Charter of Fundamental Rights does, it is true, recognise (sic) the right to property (and the protection of intellectual property). *With regard to the present legal position, however, I attach more importance to Article 6 TEU.* That article requires the European Union to respect fundamental rights, as guaranteed by, inter alia, the ECHR, as general principles of Community law. One of those fundamental rights is the right to property, as referred to in Article 1, First Protocol, of the ECHR (italics added).[30]

The italicised paragraph might be read as an implicit criticism of the literal tenor of Article 17(1). More specifically, the AG seems to argue that Article 17(1) is not a proper restatement of the *acquis communitaire*. This is why she argues by reference to one of the legal sources that the Charter is supposed to have consolidated, rather than by reference to the Charter itself. This should not be interpreted as a criticism of the Charter as a whole. In previous opinions,[31] AG Geelhoed had referred in a very positive manner to the Charter. She clearly circumscribes her argument by saying that it applies to 'the present legal position'.

bb) A Contextual Interpretation of the Provisions of the Charter

Moreover, the Charter should be interpreted in the light of the previous jurisprudence of the European Court of Justice and of national constitutional courts on fundamental rights protection. It should always be kept in mind that the Charter constitutes a *consolidation* of the *acquis communitaire*.[32]

---

[29] Case C-491/01, *The Queen v. Secretary of State for Health ex parte: American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, supported by: Japan Tobacco Inc. and JT International SA*. Opinion delivered on September 10, 2002, not yet reported.

[30] Par. 259 of the referred Opinion (italics added).

[31] See Case C-413/99, *Baumbast and 'R v Secretary of State for the Home Departament*, Opinion delivered on July 5, 2001; Case C-313/99, *Mulligan and Others v Minister of Agriculture and Food, Ireland and Attorney General*. Opinion delivered in July 12, 2001.

[32] On the implications for social rights, see Koen Lenaerts and Petra Foubert: "Social Rights in the Case Law of the European Court of Justice. The Impact of the Charter of Fundamental

This requires being cautious when deriving normative consequences from the comparison of the literal tenor of Article 17 with the provisions on rights to solidarity. Community law is clearly inspired by the *common constitutional traditions*, pervaded by notions such as the 'social function' of private property and the *fundamental* character of some basic social rights.

III. Implications

A) Social Rights as Canon of Exceptions to Market Freedoms

The Charter was solemnly proclaimed immediately before the Nice European Council by the European Parliament, the Commission and the Council. The latter failed to render the Charter unequivocally binding in legal terms. That would have required proper incorporation into the Treaties. However, and as it has already been argued in this book,[33] the lack of incorporation does not mean that the Charter has no legal bite. On the one hand, the Charter *consolidates* existing law, and as such, it must be considered as authoritative evidence of the *common constitutional traditions*. The Opinion of Advocate General Tizzano in BECTU, already commented in this book,[34] illustrates the influence of the Charter in further clarifying the social rights stemming from Community law. On the other hand, the Charter furthers the development of a more articulated system of fundamental rights, encouraging a *rebalancing* of the different goals of European integration.

In fact, the most innovative feature of the Charter might not be the series of statements on social rights, but the affirmation of *solidarity* as one of the founding values of the Union. The second paragraph of the Preamble introduces an authoritative statement of the founding values of the Union, which are said to be human freedom, dignity, equality and *solidarity*. *Solidarity* is the title of the referred chapter IV, something which opens up for a systemic interpretation of Community law in the light of such a value. The Charter enumerates several rights to solidarity, although the realisation of some of these is not within the actual field of competence of the Union. The overlapping effect of Article 51 and the Charter clauses that refer to national constitutional law rule out that any competence accrues to the Union. The affirmation of such rights, coupled with the decision not to give 'fundamental' status to the four economic freedoms,[35] reinforces the

Rights of the European Union in the Standing Case-Law", *Legal Issues of European Integration*, 28 (2001) , pp. 267–296.

[33] See, for instance, chapter 2 of this book.

[34] See page 43.

[35] They are only referred to in the Preamble. Some of such freedoms can be subsumed in some provisions of the Charter. Thus, Article 16 (freedom to conduct a business) can be seen as encompassing the freedom of establishment. However, the right is formulated at a higher level of abstraction.

argument that European integration is not only about negative integration or market-making, but also about market-redressing. All these features of the Charter render possible to grant more weight to social values when interpreting the provisions of Community law.

In such a light, the rights to solidarity included in the Charter could be construed as a canon of social exceptions to the basic economic freedoms.[36] Thus, the set of rights included in chapter IV of the Charter, under the heading 'solidarity', could be interpreted so as to provide support to Member States when claiming exceptions from the four economic freedoms in order to further goals of a socio-economic character.[37] In that sense, the Charter systematises the fragmentary set of exceptions elaborated by the Court of Justice. European judges have moved from an *automatic* affirmation of the four market freedoms to their *balancing and weighting* with other fundamental interests. This 'balancing' of economic goals against social values can already be found in the famous *Cassis de Dijon*. The Court argued that in the absence of common rules, obstacles to free movement of goods within the Community must be accepted "in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer".[38] Two clear recent examples of 'unwritten' exceptions to the economic freedoms can be found in *Bachman* and *Albany*. The exceptions were claimed in the name of, respectively, cohesion of the tax system[39] and promotion 'throughout the Community of a harmonious and balanced development of economic activities' and 'a high level of employment and social protection'.[40]

Under the reading proposed here, rights to solidarity are to be seen as the systematic elaboration of the fragmentary set of exceptions from economic freedoms elaborated by the Court of Justice, itself departing from the exceptions explicitly formulated in provisions such as Articles 30, 39(3) or 46(1) TEC.[41]

---

[36] The representative of the British government in the Laeken Convention, Mr. Hain, proceed to slightly twist this argument, claiming that the inclusion of social and economic rights in the Charter, without sufficiently strong horizontal clauses, gave rise to the risk of "our domestic legislation being disregarded on social matters". See the verbatim reports of the Plenary meeting of the Convention, of October 3, 2002. Available at http://www.europarl.eu.int/europe2004/textes/verbatim_021003.htm.

[37] See Olivier De Schutter: "La contribution de la Charte des droits fondamentaux de l'Union européenne à la garantie des droits sociaux dans l'ordre juridique communautaire", 12 (2001) *Revue Universelle des Droits de L'Homme*, pp. 33–47.

[38] See Case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, par. 8.

[39] See Case C-204/90, *Hanns Martin Bachmann v Belgian State*, [1992] ECR I-249, par. 21–23; Case C-300/900, *Commission v. Belgium*, [1992] ECR I-305, par. 14–16, 20–22.

[40] Case C-67/96, *Albany International BV v Stichting Bedrijfspensionenfonds Textielindustrie*, [1999] ECR I-5751. See par. 54 of the judgment.

[41] On judicially recognised exceptions, see Oliver Gerstenberg: "Transnational Governance and Democratic Accountability in the EU: What Should Constitutionalism Become? ", Paper

This potential understanding of the Charter rights underlies the Opinion of AG Jacobs in *Eugen Schmidberger Internationale Transporte Planzüge v Republik Österreich.*[42] The case concerns the balance to be struck between the basic economic freedoms and the freedoms of expression and assembly, as stated in Articles 11 and 12 of the Charter. A legal demonstration in Austria had resulted in a serious distortion of road traffic between Italy and Northern Europe. An Austrian entrepreneur claimed damages to the Austrian authorities. He argued that the authorities were to be held responsible. By granting the permission to demonstrate, they would have infringed on the freedom of movement of goods. With extensive reference to the Charter, the Advocate General claims that there is a need for a proper weighting and balancing of economic freedoms and fundamental rights. The outcome of such a balancing exercise cannot be predetermined once and for all, but must be undertaken with reference to each specific case. In this concrete instance, AG Jacobs argues that preference should be given to the freedoms of expression and assembly.

Also interesting is the Opinion of AG Geelhoed in *American Tobacco*, to which reference has already been made in a previous chapter. The AG revisits the relationship between economic freedoms and social goals in Community law. The AG argues that at its present stage of development, Community law does not aim exclusively at the creation of a single market, but also includes other legitimate goals of Community action, such as the protection of public health. The Union's competence basis might still be related to the fostering of the basic economic freedoms, [43] but this does not mean that the *actual exercise* of Community competences is exclusively aimed at market-making.[44] AG Geelhoed argues that some of the social goals constitute basic preconditions for a single market. This prompts her to hint at a radical change in legal reasoning. Instead of focusing in a first step on whether a given national provision distorts the common market, and only in a second step on whether such a measure can be justified by reference to some legitimate public goal, some paragraphs of the text invite a direct weighting and balancing of principles.[45] Were this to be later developed by other

---

presented at the Conference on the European Charter of Rights, Oslo, 8-9 June 2001. See also Siofra O'Leary and Fernández Martín: "Judicially Created Exceptions to the free provision of services", *European Business Law Review*, 11 (2000), pp. 347–62.

[42] Case C-112/00, Opinion delivered on July 11, 2002.

[43] Par. 100: "The issue boils down to the following: if a (potential) barrier to trade arises, the Community must be in a position to act. Such action must, as I construe the *biotechnology* judgment, consist in the removal of those barriers. Article 95 EC creates the power to do so".

[44] Par 106: "In other words, the realisation of the internal market may mean that a particular public interest – such as here public health – is dealt with at the level of the European Union. In this, *the interest of the internal market is not yet the principal objective of a Community measure*. The realisation of the internal market simply determines the level at which another public interest is safeguarded" (my emphasis).

[45] Par. 229: "The value of this public interest [public health] is so great that, in the legislature's assessment other matters of interest, such as the freedom of market participants, must be made subsidiary to it."

Advocates General and by the Court, it would advance the *constitutionalisation* of Community law, in the sense of rendering the framework of legal reasoning closer to what is characteristic of national constitutional laws.[46]

The only serious obstacle to such a *use* of rights to solidarity is the restrictive literal tenor of Article 51, section 1, which states that Member States are bound by the Charter "when they are implementing Union law". Such a wording is too narrow, as it was well-settled in the jurisprudence of the European Court of Justice that Member States were bound by 'European' fundamental rights standards when they invoked an exception to the market freedoms. However, such an objection can be overcome with two further arguments. First, Article 51, section 1 can be read as determining the 'compulsory' scope of the Charter. It could not be read as precluding a Member State from invoking it even in an area where it is not bound by it. Even less so from invoking it *vis-à-vis* Community institutions, which are bound by the Charter *in all cases*. Second, the literal tenor of the provision should be interpreted as providing a succinct formulation of positive law at the time of codification. Thus, the scope of the Charter should overlap with the scope of fundamental rights protection established by the Court of Justice. Therefore, 'implementing' must be interpreted as comprising also those cases in which Member States claim an exception to the economic freedoms.[47]

B) Rights to Solidarity as a Vehicle of Constitution-making?

Those advocating a rebalancing of market-making and market-redressing within European integration have been especially active in promoting the clarification of the legal status of the Charter. Most of them have vindicated the incorporation of the Charter into the future Constitutional Treaty.

The considerable success of the Charter Convention (which contrasted starkly with the relative failure of the IGC 2000) was interpreted by many political actors as final evidence of the need to opt for a different procedure of Treaty amendment. The Charter Convention was perceived as a more legitimate and efficient means of writing the primary law of the Union.[48] Thus, the constitution-making process that the Union is engaged in

---

[46] A similar theoretical approach seems to be followed by Leonor Moral Soriano, "How proportionate should anti-competitive State intervention be?", *European Law Review*, 28 (2003), pp. 112-123.

[47] Some authors have pointed to the formulation of Article 49, section 1 as evidence to the contrary. See the critical remarks of Weiler in a discussion which took place at Harvard. Available at http://www.jeanmonnetprogram.org/wwwboard/seminar01/Vitorino_Discussion.rtf. He finds the drafting of the Charter poor as reference is only made to "implementing Union law".

[48] See Florence Deloche-Gaudez: "La Convention pour l'élaboration de la charte des droits fondamentaux : une méthode 'onstituante'?", in Renaud Dehousse (ed.): *Une Constitution pour l'Europe?* (Paris: Presses de Sciences Po 2002), pp. 177–226.

at the time of writing has been partially influenced by the design of the Charter process. But besides this *procedural influence*, the Charter, and specifically its provisions on rights to solidarity, has exerted a considerable influence on the contents of the constitution-making process. Evidence of this can be found in the emergence of social policy as one of the central concerns of the Laeken Convention.

Their *partial* disappointment with the number and content of 'rights to solidarity' included in the Charter, and also with their *weak* eventual status, encouraged the more socially conscious members and observers of the Charter Convention to reiterate their claims in the Laeken process. The more open character of the mandate was in principle favouring their drive for a 're-balancing' of economic and social goals. Public demonstrations parallel to major European meetings were organised around similar themes. Several members of the Convention stressed the importance of a 'social shift' in European policies.[49] The incorporation of the Charter of Fundamental Rights into the forthcoming Constitutional Treaty was in most cases referred as a basic demand, even if it was to be further complemented by other constitutional provisions.

Quite paradoxically, the demand for attention to social issues was strengthened by an opinion article written by the President of the Convention, Valery Giscard D'Estaing, in which he asserted that no member of the Convention had argued for an increased competence of the Union in social matters.[50] As a reaction to this statement, a number of members of the Convention drafted and circulated a motion to create a specific working group on 'Social Europe'. This was submitted to the Praesidium at the end of September, supported by more than thirty signatories.[51] The question was raised by several members in the Plenary sessions in October.[52] The Praesidium apparently tried to settle the question by means of devoting some time in the Plenary to a debate on social issues.[53] But more members of the Convention sent written contributions where they spelled out their arguments

[49] See, among others, CONV 13/02, by Alain Barrau, pleading for a European Social Treaty; CONV 63/02, which reproduces the plea in favour of a 'New Federalism' with a major social content, authored by several Socialist MEPs; CONV 86/02, "Socio-economic governance in the constitutional Treaty", by Ms. Anne Van Laecker, who claims that social issues must be dealt with by the Constitutional Treaty, given that they are the main concern of all Europeans; CONV 189/02, authored by several socialist MEPS who are members of the Convention, in which they plea in favour of the European Social Model; CONV 190/02, "A Constitutional Treaty for a Social Europe", by Sylvia-Yvonne Kaufmann, who spells out what a social shift will entail in her opinion.

[50] "La dernière chance de l'Europe unie", Le Monde, 22 July 2002. Available, by subscription, at http://www.lemonde.fr/abonnes/article/0,9883,3232--285497-,00.html.

[51] See CONV 300/02, "Motions to the Praesidium according to Article 2 and 15 of the Working Method: Constitution of a Working Group on Social Europe". Most of the signatories were affiliated with left-wing political parties, or left-of-the-centre, as the Scottish Nationalist Party.

[52] See Verbatim Report of the Plenary Meeting of the Convention, October 3, 2002, reference in fn. 31.

[53] See CONV 374/02, "Questionnaire for the debate on social issues", of 29.10.2002.

in favour of rebalancing the goals, objectives and policies of the Union in a social direction.[54] The failure of the Working Group on Economic Governance to advance much on its mandate created further momentum for such an initiative.[55] The European Trade Union Confederation ventured to argue that reference to an "open economy with free competition" in the Treaties should be replaced by reference to 'a social market economy', rendering European constitutional law compatible with different economic policies.[56]

The debate on social issues that took place on November 7th, 2002 led to the actual creation of a working group on social Europe. It might not be inappropriate to notice that timing favoured the advocates of such a measure, as that very same day the 'Social Forum' organised in Florence closed its doors, after a massive demonstration in which half a million people demanded a more social Europe. Even if the decision to constitute a specific group within the Convention might have been taken before that date, popular pressure was perceived as favouring such an outcome. In the debate, only a handful of speakers failed to endorse the case for a working group on social Europe. This led to a perception of multi-partisan support for such a group. Under these circumstances, the Praesidum of the Convention felt they had no option but to accept the proposal.[57] The Group was effectively constituted on December 6th, 2002, with a mandate to consider the extent to which *social goals* and *instruments* should be included in the Treaty, and how they should be balanced with the goals related to the creation of a single market.[58] Whatever the outcome, the fact that social issues became unavoidable tells us quite a lot about their place at the heart of the common constitutional traditions of the Member States.

Conclusion

The very fact that the Charter included rights to solidarity is quite telling. The inclusion of social rights in the main text, while market freedoms were confined to the preamble, might reflect the progressive shift in Union law from market-making to polity-making. Thus, and despite all its shortcomings, the inclusion of social rights reveals the extent to which balancing markets with social objectives is part of the constitutional identity of all Member States.

---

[54] See, for example, CONV 388/02, by Pierre Moscovici.
[55] See CONV 375/1/02, REV 1. "Final Report of the Working Group on Economic Governance", and Verbatim Report of the Plenary Meeting of the Convention, November 7th, 2002; available at http://www.europarl.eu.int/europe2004/textes/verbatim_021107.htm.
[56] CONV 433/02, submitted by Emilio Gabaglio, observer to the Convention.
[57] "J'imagine que nous allons pouvoir, suivant la procédure qui consiste en un débat à la Convention, un débat au praesidium et une proposition, proposer, lors de notre prochaine session, la création d'un groupe de travail sur l'Europe sociale."
[58] CONV 421/02, Draft Mandate of the Working Group on Social Europe, of 22.11.2002.

Having said that, there are reasons to be concerned with the imbalance between the status attributed to the right to private property (a fundamental right proper) and most rights to solidarity (in most cases, ordinary rights or policy objectives). Legal creativity would be needed to shield social rights protection from the *negative* implications of such a drafting.

Some elements of creativity seem to be in place already. The Charter has started to be used by individuals. The growing number of cases in which the Charter is being invoked proves that plaintiffs across Europe regard the Charter as a text empowering them to claim their rights. The Charter is emerging also as a canon of social exceptions to the four basic economic freedoms of the Community. This might encourage a rather radical reappraisal of the weighting and balancing of social and economic objectives by the Court. It is becoming increasingly clear that social rights are deeply dependent on certain public policies, noticeably regulatory and taxing ones. By means of ensuring that political communities can actually pursue such policies within the framework of Community law, appropriate protection is partially granted to social and economic rights.

But legal ingenuity cannot replace political will. Signals of a political mobilisation in favour of a stronger social protection at the European level are coming from the present constitutional process. Whether or not they will end up having its say on the final constitution is still to be seen. This chapter aimed at showing that rights to solidarity *should* be regarded as the sinews of European peace and fairness.[59]

[59] On this regard, see the *European Social Agenda*, Official Journal of the European Communities, C series, n. 157, of 30.5.2001, pp. 4 ff.

Chapter 10

The Double Constitutional Life of the Charter of Fundamental Rights

Miguel Poiares Maduro[1]

Let me start with a cliché: the Charter of Fundamental Rights represents a constitutional paradox. It reflects an emerging trend to agree on the use of the language of constitutionalism in European integration without agreeing on the conception of constitutionalism underlying such a language. For some, the Charter is the foundation upon which to build a true constitutional project for the European Union. It will promote the construction of a European political identity and mobilise European citizens around it. For others, the Charter is simply a constitutional guarantee that the European Union will not threaten the constitutional values of the States. It is a constitutional limit to the process of European integration. The Charter reflects this tension between its conception as a constitutional instrument for polity building and its conception as a simple consolidation of the previous fundamental rights *acquis* aimed at guaranteeing regime legitimacy.[2] These two conceptions confronted themselves in the drafting of the Charter,[3] and are reflected in many of its provisions. It is thus difficult to clearly establish the nature of the relationship between the Charter and European constitutionalism. Much will depend on which of those two constitutional conceptions becomes the dominant constitutional discourse on the Charter. In this chapter I will review the impact of the Charter of Fundamental Rights on European Constitutionalism while identifying and taking into account the underlying tension between those constitutional conceptions of the Charter.[4] In some cases, the impact of the Charter on the European Constitution will be largely independent of its legal bite. In other cases, however, that impact may vary

---

[1] This essay stems from a paper initially prepared for a workshop on the Charter and Fundamental Social Rights that took place in the University Nottingham.

[2] On the notion of regime legitimacy see infra. For a similar discussion of this tension, see Fossum in this volume.

[3] Grainne de Burca: "The Drafting of the European Union Charter of Fundamental Rights", *European Law Review*, 26 (2001), pp. 126–138. It was also reflected in the different justifications advanced to justify the need of a European Charter of Fundamental Rights. As stated by Christopher McCrudden: "these justifications often point to entirely different models of a human rights Charter" ("The Future of the EU Charter of Fundamental Rights", Jean Monnet Paper Nº 10/01, Jean Monnet Chair Working Papers, including contributions by Cristopher McCrudden, Grainne de Burca and Jacqueline Dutheil de la Rochèle; available at http://www.jeanmonnetprogram.org/papers/papers01.html; see especially page 9. See also chapter 11.

[4] They are not linked, however, to a particular position on the legal value that ought to be given to the Charter. As a consequence, the analysis undertaken in this chapter is not dominated by the debate on the legal binding value of the Charter.

depending on whether or not the Charter will have legally binding value.[5] Thus, in some instances I will assume that the Charter will be given some form of legally binding value as the work of the current Convention on the future of Europe appears to indicate.[6] But I will also highlight current instances in which the discussion on the legal value to be given to the Charter identifies different perceptions of its constitutional impact.

The discussion on the constitutional dimensions of the Charter will also be linked to the current constitutional debate on the future of Europe. It now appears clear that both the Convention and the 2004 Intergovernmental Conference will adopt some form of constitutional document for the European Union. But this agreement on constitutional language may hide two different conceptions on the role of constitutionalism in the EU. Such conceptions are already identifiable in the Charter. In this way, the analysis of the Charter gains an added importance in the discussion of the constitutional future of the Union.

I will start by discussing how the Charter affects the constitutionalisation of the EU. How it constitutes a different form of constitution-making in the European Union and what are and/or ought to be the consequences for the current constitutional debates on the Future of Europe. Following that, I will review the impact of the Charter on the *acquis communautaire* and the current constitutional model of the European Union, concerning both its institutional balance and its constitutional values. I will address issues such as the impact of the Charter on the role of the European courts, the scope of application of EU fundamental rights, and the balance between the different constitutional values of the Union. Next, I will discuss the polity building value of such a constitutional document: will it help in forming a European political community and legitimising the process of European integration? Finally, I will review the impact of the Charter on the relationship between the EU legal order and national constitutions, notably on the issue of ultimate legal and political authority.

---

[5] For Antonio Vitorino, the Commission representative at the Convention on the Charter and now responsible for the working group on the Charter in the current Convention, there is no doubt that the Charter will have binding effect, the only question is when and how. For an analysis of the different possible forms of legal effect of the Charter independently from an express attribution of legal binding value see Agustín J. Menéndez: "Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union", *Journal of Common Market Studies*, 40 (2002), pp. 471–490, at p. 472 ff.

[6] See chapters 1, 2 and 11 of this volume.

I. The Charter and Constitution-Making in the European Union

The process of constitutionalisation of the European Communities[7] has been mainly a functional development of a set of Treaty rules centred on the promotion of a common market. Europe's constitutional dimension has, therefore, been closely linked to the logic of economic integration. Europe assumed a constitutional body without a constitutional soul: it lacked a process of truly constitutional deliberation. In some respects, the process of constitutionalisation was an unintended consequence of inter-governmental bargaining among States, albeit the latter was ratified through the political practice of those States. As it is well known, those constitutional consequences were mainly a product of the European Court of Justice. In this way, some perceive the process of constitutionalisation as an illegitimate expansion of the ambitions of the European integration project. Others accept and favour such a constitutionalisation but see it as lacking a full constitutional expression backed by a classic process of constitutional deliberation. The Charter reflects these two perspectives. It marks a departure from the traditional way of 'doing constitutional business' in Europe, and it does so by embracing a process of deliberation much closer to the traditional forms of constitutional deliberation. But the way in which such a process is embarked upon reflects two different constitutional perspectives. There are those that supported the Charter of Fundamental Rights because they saw it mainly as the codification of the fundamental rights which had already been recognised in the Treaties, legislation or the case law of the Court. The Charter would both reinforce the limits on EU powers and reinstate Member States' control of the process of constitutionalisation. There are others, instead, who perceived the Charter as the starting point of a truly constitutional deliberative process and the construction of a European political identity. The role attributed to the Convention on the future of Europe, its composition and its decision-making process reflected components of these two perspectives.

As is now well known, it was in the Cologne European Council of June 1999 that it was decided "to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens".[8] This aim limited the ambitions of the Charter: the proclaimed goal was to make the protection of fundamental rights *already provided for* in the EU more visible to its citizens and not to change the nature and scope of that protection. This was reinforced by the attribution to

[7] I restrain myself from citing the large bibliography on such a process. For one such see Joseph H. H. Weiler: *The Constitution of Europe* (Cambridge: Cambridge University Press 1999).

[8] Cologne European Council 3 and 4 June, Presidency Conclusions, paras 44–45 and Annex IV. Available at http://ue.eu.int/Newsroom/LoadDoc.asp?BID=76&DID=57886&from=&LANG=1.

the Charter of a mere role of consolidating the fundamental rights already recognised in the EU legal order. Seen in this light, the Charter would mainly serve as an additional instrument of constitutional control over the EU and not of constitutional building of its polity. It would reassure that the EU would not threaten the national constitutional values identified with the protection of fundamental rights, and by making these rights clearer for European citizens, it would increase the degree of review of the powers exercised by the EU. Furthermore, it would reinstate political control over the EU catalogue of fundamental rights which, so far, had been mainly determined by the case law of the European Court of Justice.

But the Council also agreed on an innovative process to draft the Charter. A body, that came to be known as the Convention, was set up to prepare such a draft. It was composed of representatives of the Heads of State and Government and of the President of the Commission, as well as of members of the European Parliament and national parliaments.[9] Its specific composition and working methods were established by the Tampere European Council.[10] Though the legal status to be assumed by the Charter was left open,[11] the Charter Convention decided to work on the assumption that the Charter would ultimately be given legally binding effect. Though such a process also presented elements reflecting the narrower constitutional discourse on the Charter (the role attributed to national parliaments may be seen as ascertaining that Europe's constitution-making can only proceed through national polities) it constituted, in many other respects, a constitutional breakthrough for those that argue in favour of the adoption of a real process of constitutional deliberation in the Union. It may not be an overstatement to say that the most important constitutional dimension of the Charter stems from its process of deliberation. Though ultimately adopted simply as a declaration from the EU institutions, the Charter was the result of a drafting process that constituted a kind of constitution-making experiment for the European Union. Instead of being subject to the traditional inter-governmental process, the drafting of the Charter was the product of a different kind of process: the Convention. The proclaimed success of such a method led to a similar method being adopted in the context of the current constitutional process on the future of Europe. In this sense, the Charter Convention consisted of an experiment in constitution-making that spilled

[9] *Ibid*., Annex IV.

[10] Tampere European Council 15 and 16 of October 1999, Presidency Conclusions, Annex on the Composition, Method of Work and Practical Arrangements for the Body to Elaborate a Draft EU Charter of Fundamental Rights. Available at http://ue.eu.int/Newsroom/ Load Doc. asp?BID=7 6&DID=59122&from=&LANG=1

[11] "The European Council will propose to the European Parliament and the Commission that, together with the Council, they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It will then have to be considered whether and, if so, how the Charter should be integrated into the treaties. The European Council mandates the General Affairs Council to take the necessary steps prior to the Tampere European Council" (*ibid*., Annex IV).

over into the current Convention on the Future of Europe. Therefore, the extent to which this method truly has a constitutional character and the impact it may have on the outcome of the current debates can, at least in part, be assessed by looking at the convention method of the Charter.

But what makes such a process more 'constitutional'? And how does it affect the constitutional outcome? Usually, the stress is placed on the broader scope of representation entailed in such a method. As stated, the Convention was composed of representatives of the EU institutions, national parliaments, and national governments. It also promoted a broader participation from the 'so-called' civil society (though the extent to which it did so successfully is a cause of dispute).[12] However, its constitutional characterisation can also be linked to other features. One should also take into account the deliberative way in which the members proceeded and the balance between the political and the judicial roles in the constitutionalisation of the European Union. The Convention method presents, with regard to these three aspects, a major departure from the two traditional methods of constitutional development in the European Union: the inter-governmental process and judicial activism.

A) The Scope of Representation

As stated, the Convention drew its participants from a much broader pool of institutions. In particular, the role played by national parliaments and the European Parliament was aimed at expressing a more direct link with the European citizens. These institutions (notably, national parliaments) are seen as expressing a form of direct representation that national governments lack. In this sense, the Convention method, by comparison with the inter-governmental method, appears closer to a Constitutional Convention with direct representatives of the people reflecting the different social interests. But also the presence of representatives of the national governments reflected a pattern of representation different from the classical inter-governmental process. In some cases, though not all, they were independent personalities selected in view of their technical and/or political experience, and not as representatives of the State. This might also have been the case because national governments did not fully grasp the potential impact of the Convention. It was regarded by some as a mere intellectual exercise that would then be subject to the political impact of the inter-governmental process. Yet, once again, the "being" escaped the control of its creator and it is now clear that, whatever the legal status that will be ultimately accorded to

[12] See de Burca: *supra*, fn. 3, and Jonas Bering Liisberg: "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law", *Common Market Law Review*, 38 (2001), pp. 1171–1199, namely at p. 1182. See chapter 7 in this volume.

the Charter, its content will essentially, if not fully, correspond to that agreed to at the Convention.[13]

The approximation to a constitutional model of deliberation 'by the people' was also promoted by the added legitimacy that the Convention attempted to draw from the broader participation of individuals and social groups whose contributions where asked for and stimulated (albeit not often taken into account).[14] At least theoretically, civil society participation was furthered and much emphasis was placed on making the debates more transparent for public opinion. This mirrors an idea of constitutional deliberation for Europe: constitutional moments are identified with a much broader mobilisation of society and a higher degree of direct participation from citizens.[15] The deliberative process on the Charter would enhance Europe's constitutionalisation by promoting such broad involvement and, at the same time, help legitimise it.

B) The Character of Deliberation

The second major difference brought in by the Convention method regards the way deliberation is expected to take place and the nature of the contract arising thereof. Intergovernmental Conferences have as their purpose the production of an agreement between States. A forum of inter-governmental bargaining is expected to reduce information and transaction costs between States facilitating the adoption of cooperative decisions. Each State departs from a pre-definition of the national interest that it attempts to promote and harmonise with the interests of the other States. This inter-governmental bargaining is quite different from the nature of the deliberative process usually identified with the framing of Constitutions. In the latter, the vision of a social contract appears with its universal underpinnings. Deliberation is seen as an agreement among individuals on the basis of universally

[13] This explains why some national governments decided to appoint national ministers or other public officials as their representatives in the current Convention on the Future of Europe. This has been reinforced in the recent past by the changes undertaken by some States in their representation. Many States now perceive the Convention on the Future of Europe as potentially more important than the 2004 IGC in shaping the future of the European Union. This inter-governmentalisation of the Convention may, however, undermine some of the constitutional aspects of its deliberation.

[14] Liisberg notes that "even if the Charter process was extraordinarily open, the drafting history of individual provisions is far from transparent. In some ways, tracking provisions of human rights conventions drawn up at diplomatic conferences under the auspices of the United Nations is easier. The uniquely pluralistic and diverse process for the drafting has much to be said for it, in terms of popular participation and legitimacy, especially as compared to the traditional very secretive treaty-making process of the EU. But such a process may also enhance and disguise the power of the draftsmen who lurk behind the piles of drafts and amendments, and may thus paradoxically produce less, rather than more, accountability and transparency" (See: *supra*, fn. 12, at p. 1182).

[15] For an in depth analysis see Bruce Ackerman: *We The People*, vol. I: *Foundations* (Cambridge, MA: Harvard University Press 1991).

constructed rules under a hypothetic veil of ignorance. The framers of a Constitution are seen as rational actors in search of universal rules that can best satisfy everyone's future interests.

This form of constitutional deliberation is substantially different from intergovernmental bargaining, even when we realise that every constitutional deliberation is shaped and influenced by the specific interests of the participants and the context they are in. The difference arises from four elements that the Convention method expresses, albeit in an imperfect manner. First, the expectation is that an overall political contract will be produced, not a mere bargain on certain opposing interests; this helps detaching participants from their context and forcing them to take an overall long term perspective that is more conducive to the universalisable rules, said to be typical of a constitutional contract. Second, the creation of a forum of stable long-term deliberation, instead of the short-term highly concentrated (though previously prepared) intergovernmental conferences, shifts the attitude of participants towards the process of deliberation itself and promotes higher mutual trust, stronger involvement and a more rational engagement between the participants. Third, the participants in the Convention were expected to consist of more independent individuals, more committed to coherent conceptions of the common good than to pre-established assertions of the national interest. Even when that is not the case, because, for example, national governments appoint public officials as their representatives in the Convention, the Convention method still promotes a more open deliberation on the part of the participants. This is due to the circumstance that the 'national interest' is not represented by a particular single representative at the process of negotiation. The variety of national participants both releases them from being the individual guardians of a pre-defined national interest and challenges their respective notions of that national interest. The fourth and final element of constitutional differentiation of the Convention deliberative method regards its potential higher transparency. The subjection of the deliberative process to higher transparency requires arguments to be put forward in terms of universal rules of a social contract, and not as a defence of the national interest. This different character of the arguments that participants 'can use' will end up reflecting itself in the agreements that they will reach.

It is wrong, however, to adopt an idealist perspective on the Convention method. On the one hand, this process entrusts a great degree of authority to those that shape the agenda and provide the technical expertise and the legal drafting required. The 'independence' and lack of in-depth expertise of many of the participants make them much more dependent on the EU technocracy.[16] At the same time, in such a large scale and comprehensive project, the Praesidium and the Secretariat assume a key role in setting the

[16] de Burca, *supra*, fn. 3, and Liisberg, *supra*, fn. 12, at p. 1178.

agenda, processing the different amendment proposals, and drafting final versions. This is visible in the process of drafting the Charter and in the tremendous impact that the EU technocracy and the Praesidium had on the final versions of the more contentious provisions, particularly when compared with the degree of incorporation of the amendments proposed by other participants at the Convention and civil society.[17]

C) The Politicisation of Europe's Constitutionalisation

The third constitutional change introduced by the Convention method on Europe's constitution-making was a reinstatement of political control over the constitutional development of European integration. As said above, it is well known that the constitutionalisation of EU law has been a judicially driven process. The introduction of fundamental rights protection was a key example of the role of the European Court of Justice in that constitutionalisation. It was the Court that introduced a system of fundamental rights protection in the European Communities and it was the Court that controlled such a catalogue through the criteria it developed itself.[18] In this instance, the political process ended up simply ratifying the constitution-making of the Court by restating it in Article 6 (2) of the TEU. The drafting of a Charter of Fundamental Rights constitutes in this light a challenge to the European Court of Justice's role in the constitutionalisation of the European Union. It is the political process taking back the definition of the system and the catalogue of fundamental rights in the European Union. There are important consequences that can be expected in the outcomes arising from these two different processes once both representation and the form of deliberation differ between them. It also affects the sources of law and the process of discovery that has dominated the European Constitution. In the absence of a written Constitution, the Court of Justice has constitutionalised the European Communities (now the EU) by reference to the constitutional principles of its Member States. The European Constitution becomes, in this light, mainly a product of both the EU Treaties and the national constitutions, and it is from these sources that the constitutional values of the emerging polity are to be found by the Court. Once the EU political process takes over, EU constitutional values become a product of a trans-national political deliberative process that takes place at the EU level. The dynamics of this new constitutional political arena is bound to determine a different set of constitutional values. It is this that explains some of the substantive constitutional changes introduced by the Charter even if, in

[17] See Liisberg: *supra*, fn. 12, at p. 1178, and de Burca: *supra*, fn. 3.

[18] For a presentation of such process see Bruno de Witte: "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Philip Alston (ed.): *The EU and Human Rights* (Oxford: Oxford University Press 1999), pp. 859–897, at p. 863–869. See also chapter 2 of this volume.

theory, it was not supposed to be more than a simple consolidation of the pre-existent EU fundamental rights.

II. The Charter and the Constitution

The Charter was officially proclaimed to be nothing more than an exercise in codification and consolidation of the rights that were already recognised in the Treaties, the Court's case law and Community legislation. The aim was not to alter the substance of fundamental rights protection in the Union but to make that protection clearer to European citizens. That was expected to promote a more effective application of those rights and, at the same time, reinforce the legitimacy of the integration process. It is this that also explains why the attribution of legally binding effect was not considered to be a priority. However, the final product is much more complex. The duplicity of constitutional discourses on the Charter also comes to light in its catalogue of rights that is broader than what would simply result from the consolidation of previous Community legislation, Treaty provisions and the Court's case law. In fact, the Charter constitutes the most comprehensive catalogue of rights adopted in many years.[19] On the other hand, the scope of application of these rights is substantially limited in its horizontal provisions. This expresses once again the dual constitutional conceptions of the Charter identified above. Its reading as a novel and ambitious constitutional document or as a simple consolidation of the previous fundamental rights *acquis* will ultimately determine the degree of its impact on the content of the European Constitution. And the Charter can, in effect, produce important changes in the values and institutional balances of the European Constitution. Even if seen as a simple dogmatic restatement of the pre-existent rights in EU law it is bound to impact on the constitutional conception of the rights affirmed in the Treaties, case law and legislation. It is sufficient to read some of the rights developed in the Charter to see that its content is altered, albeit in a context of restatement of a previously existent right (the wording of the right to property, for example, is closer to the case law of the ECHR than that of the ECJ). Consider also how the systematic placing of the rights may alter their future interpretation and the balance with conflicting rights and values. The legal dogmatic reconstruction of an existent landscape of rights will inevitably change that landscape. But the extent to which it will do so and the sense in which the change will take place will depend on which constitutional conception of the Charter will become dominant. The following are a few

[19] Giorgio Sacerdoti: "The European Charter of Fundamental Rights: From a Nation State Europe to a Citizens Europe", *Columbia Journal of European Law*, 8 (2002), pp. 37–52, at p. 43.

important examples of possible constitutional impacts and of their interaction with the alternative constitutional conceptions of the Charter.

A) The Standard of Fundamental Rights Protection

What impact may the Charter have on the standard of fundamental rights protection guaranteed by the European Court of Justice? For those that believe that the Court "has not taken fundamental rights seriously",[20] the Charter may be seen as requiring from the Court a more sophisticated and articulated approach in this area of the law. German scholarship, in particular, has expressed some degree of concern with the level of fundamental rights protection accorded by the ECJ and, as a result, has tended to see in the Charter an attempt to promote the adoption of a *higher* standard of fundamental rights protection by the Court of Justice.[21] One author has remarked that the Charter "by convincing the ECJ of the overall importance of the protection of fundamental rights it can lead the ECJ to accept that this is the principal mission it has to accomplish".[22] Yet, though some specific problems may at times have been pointed out in the Court's approach,[23] there has never been any sustained widespread challenge to the decisions of the Court in the area of fundamental rights, neither have those decisions been effectively linked to the problems of political and social legitimacy faced by

[20] This is the title of an article that became famous because of its very harsh critique of the Court's approach to fundamental rights: Jason Coppel and Aidan O'Neill: "The European Court of Justice: Taking Rights Seriously", *Common Market Law Review*, 29 (1992), pp. 669–692. No less famous became an article by Weiler and Lockart challenging that reading of the Court's case law: Joseph H. H. Weiler and Nickolas Lockhart: "Taking Rights Seriously: The European Court and Its Fundamental Rights Jurisprudence", *Common Market Law Review*, 32 (1995), pp. 51–94 and pp. 579–627

[21] See Thomas von Danwitz: "The Charter of Fundamental Rights Between Political Symbolism and Legal Realism", *Denver Journal of International Law and Policy*, 29 (2001), pp. 289–304, at pp. 293–294; and, for a general review of German scholarship, Armin von Bogdandy: "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", *Common Market Law Review*, 37 (2000), pp. 1307–1338, at pp. 1312 and 1320 ff.

[22] von Danwitz: *supra*, fn. 21, at pp. 294–295.

[23] See, for moderate critiques highlighting some shortcomings of the Court's case law: Andrew Clapham: "A Human Rights Policy for the European Community", *Yearbook of European Law*, 10 (1990), pp. 309–366; and Witte, *supra*, fn. 18. Perhaps the only case where a Court's judgement on fundamental rights has been seriously under challenge has been the decision on the Bananas regulation. See Case C-280/93, *Germany v Council* [1994] ECR I-4973 and the harsh opposition to it by Ulrich Everling: "Will Europe Slip on Bananas?", *Common Market Law Review*, 33 (1996), pp. 401–437. The possible collision with German courts was, nevertheless, prevented by subsequent decisions of both the ECJ and the German Constitutional Court (Case C-68/95, *T. Port v. Bundesanstalt für Lanwirtschaft und Ernährung* [1997] ECR I-6065 and the Bundesverfassungericht Decision of 7 June 2000, BVBVerfG, 2 Bvl 1/97 from 7.6.2000, Absatz-Nr. (1–69), available at http://.bverfg.de/). For an analysis see von Bogdandy, *supra*, fn. 21, at pp. 1322–1323.

the Union.[24] Moreover, it is often difficult to determine what constitutes the highest level of fundamental rights protection.[25] Citizens' distrust of the Union is hardly linked to the degree of fundamental rights protection accorded by the Court. It can be contested whether the level of protection accorded by the Court effectively embodies the best fundamental rights theory for the Union, but it cannot be contested that it has so far proved sufficient to prevent any widespread challenge to the legitimacy of the Union on that basis. The best evidence of this is the respect that it has earned from national constitutional courts. It is well known that some national constitutional courts have always claimed to have constitutional authority over EU acts if they violated, in a systematic or particularly serious manner, national fundamental rights without proper protection being provided by the ECJ.[26] Yet, they have never exercised these threats, a sign of trust in the way in which the Court of Justice has protected fundamental rights in the EU legal order.

Even if given legally binding value, the Charter will probably not produce any dramatic changes in the standard of fundamental rights protection in place in the EU legal order. Article 52 (1), for example, does not appear to be particularly stringent in the definition of the restrictions that can be authorised to fundamental rights. The choice of a horizontal provision to regulate in general terms the admissibility of restrictions on fundamental rights deviates, itself, from the system in place in most national constitutions and the ECHR where exceptions are regulated with respect to each fundamental right. In itself, Article 52 (1) seems to reproduce the criteria that have been affirmed by the Court:[27] restrictions must be proportional and necessary to the pursuit of general interests recognised by the Union or the protection of the rights and freedoms of others, and they must not affect the

---

[24] In this sense: Joseph H. H. Weiler: "Editorial: Does the European Union Truly Need a Charter of Rights?", *European Law Journal*, 6 (2000), pp. 95–96; and von Bodgandy: *supra*, fn. 21, at p. 1322.

[25] This is so because often what the Courts are presented with is a collision of fundamental rights. It would be possible to say that the highest standard is that which always accords the maximum protection to the individual against the State in each specific case but that will ignore that the State's interest may correspond, in practice, to other individuals' interests also worthy of protection. See Joseph H. H. Weiler: "Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities", *Washington Law Review*, 61 (1986), pp. 1103–1142, at pp. 1127 ff. For a contrasting view see Leonard. Besselink: "Entrapped by the maximum standard: On fundamental rights, pluralism and subsidiarity in the European Union", *Common Market Law Review*, 35 (1998), pp. 629–680.

[26] That has been particularly the case with the German and Italian Constitutional Courts. See their decisions (with nuances on the approaches of both courts) in, among others: Decision of the Bundesverfassungesgericht of 22 October 1986, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225; Decision 170/1984 of the Italian Constitutional Court, [1984] C.M.L.R 756; and Decision 232/89 of the Italian Constitutional Court, *Spa Fragd v. Amministrazione delle Finanze*, [1989] 72 RDI.

[27] See Case 4-73, *Nold*, (1974) ECR 491, para 14 and Case 5/88, *Wachauf* (1989) ECR 2609, para. 18.

essence of the rights and freedoms at stake. The reference to general interests, in particular, can continue to raise some concerns due to its potentially broad and undetermined character that may not totally fit the standards in place in some national constitutions.[28]

The framework created by the Charter may, however, help the Court in developing a more structured and coherent fundamental rights theory for the EU. This will be particularly important to provide a better theoretical and legal-dogmatic explanation of the different degrees of judicial activism adopted by the Court in different circumstances. Often the Court is criticised, not so much because of the criterion it uses to review EU acts in light of fundamental rights but because of a perceived lighter standard than the one used in the review of Member States' acts under similar EU rules and principles. In reality, different proportionality tests, for example, may in fact be required in different circumstances, depending on the institutions under review, the affected rights and the regulated groups. This is nothing peculiar to the EU legal order. It is well known that in any system of constitutional judicial review, courts have developed more or less stringent tests depending on the character and type of the measures under review, the interests they affect and the institutions that enact them. Such tests may be based, for example, on suspect categories affected by the legislation.[29] They may also be based on a perception of higher or lower risks of political malfunction in the institutions whose decisions are subject to judicial review in different sets of circumstances.[30] What appears to be lacking in the case law of the European Court of Justice is a coherent theoretical and legal-dogmatic explanation of the variations in the standards it uses. The Charter may help the Court in developing a more appropriate framework for its different degrees of judicial activism. This will be so because it provides the Court with both a more solid and complete fundamental rights framework, and a reinforced legitimacy in addressing the actions of other institutions in light of fundamental rights. One area where this can refocus the role of the Court in the protection of fundamental rights, regards the actions of the Council. Though it is possible to find several instances where the Court has struck down acts of the Commission in light of fundamental rights, it is more rare to find such instances with regard to the Council when acting as Community legislator. This could be explained by both the way in which the Council

[28] That is the case with the national constitutions that regulate with regard to each fundamental right the possible grounds for exceptions but it is also the case when compared with an horizontal provision such as that included in the Portuguese Constitution that only exceptions to fundamental rights to the extent necessary to safeguard other rights and interests constitutionally protected (Art. 18 (2)).

[29] The American Supreme Court is usually considered to use only a reasonableness test in reviewing legislation in general, while applying a much stricter form of judicial review where such legislation affects suspect categories (such as those determined by race or gender).

[30] For an example, see below the debate on the tests that can be adopted under the free movement of goods.

decides and in terms of its different legitimacy. The Council has often acted unanimously or with a strict qualified majority. This provides its decisions with an added measure of legitimacy. To this legitimacy, the Court could only oppose the limited legitimacy of a judicially developed catalogue of rights. It would thus make sense for the Court to concentrate its fundamental rights jurisprudence in the review of the acts of a bureaucratic body such as the Commission that enjoyed a very limited degree of democratic legitimacy and was often perceived as subject to a lower level of political accountability. A formal catalogue of fundamental rights, such as that of a legally binding Charter of Fundamental Rights, can both help to dogmatically reconstruct these differences in approach by the Court and, at the same time, reinforce the legitimacy of the Court in reviewing the acts of the Council in light of fundamental rights. Such a development will be particularly welcome in light of the current trend towards majoritarian decision making in the European Union. To a more majoritarian political system, the Court should answer with a more active role in the review of EU legislation for the protection of individual rights and minorities.

B) Institutional Consequences and the Issue of the Charter's Legal Value

The question of the standard of protection is linked with a broader issue: the definition of the role of the Court in the EU system of fundamental rights protection and, broadly, on the constitutionalisation of the Union. In particular, the way in which the Charter affects or may affect the institutional balance between the judiciary and the EU political institutions. On the one hand, the existence of a catalogue of fundamental rights will limit the ability of the European Courts to 'recognise' other rights as fundamental rights of the EU or to give particular interpretations to such rights and their scope of application and protection. It is the politically developed catalogue that becomes the predominant source of law in the definition of EU fundamental rights, replacing the sources previously identified by the Court: international human rights documents subscribed to by the Member States (in particular the ECHR) and their common constitutional traditions. The latter constitute an open and undetermined concept whose definition was mainly a dominion of the Court of Justice. As a consequence of the Charter, the Court will have its role in the definition of the European catalogue on fundamental rights limited. This will also be the case with regard to the scope of application and protection of these rights. As stated above, with the drafting of the Charter of Fundamental Rights, the political process regained control over that area of Europe's constitutionalism. This is so even if the Charter does not proclaim to be a complete exposition of the rights that the EU must protect and therefore does not prevent, in theory, the Court of Justice from developing

further rights.[31] But, in particular, if the Charter becomes legally binding, the Court will be bound to recognise and apply all its rights and, moreover, will face a much higher burden to establish rights not proclaimed therein. The discourse on EU fundamental rights will be framed by the Charter and no longer by the sources of the Court's traditional case law.

On the other hand, a broader and clearer catalogue of fundamental rights may promote greater judicial activism in the review of legislative and administrative acts of the European institutions. At the infra-constitutional level, the Charter may have the opposite effect of empowering the Court with regard to the political system. In the first place, the Charter reinforces the legitimacy of the Court in the review of the acts of EU institutions. In the second place, the higher transparency and better knowledge of EU individual rights promoted by a written catalogue such as the Charter may increase litigation against EU acts on the basis of fundamental rights. The Charter will lower the information and transaction costs for individuals in litigating in this area of the law and it will increase public awareness of the rights to be opposed against the action of EU institutions and Member States when implementing Union law. In the same way, it will allow a greater variety of legal arguments to be brought before the Court. This will both enhance the Court's legitimacy, heighten demands for greater judicial activism and possible feed new patterns into the Court's fundamental rights case law.

As a consequence of what was said, the Charter has two possible opposite effects in the relation between the EU political process and the European judiciary. On one reading it will reduce the freedom of the ECJ in developing the EU catalogue and system of fundamental rights protection. On another reading it will enhance its activism in the review of acts of the European institutions. It brings a higher political control over the process of constitutionalisation but, in turn, empowers the judiciary in the review of the acts of political institutions. These two contrasting effects may, in part, help to explain the current different attitude of the two European courts with regard to the Charter.

One could expect the Charter to acquire an indirect legally binding effect through its judicial use, in particular to interpret the common constitutional traditions of the Member States. What better evidence could there be that a certain fundamental right constitute a part of the common constitutional traditions of the Member States, than for it to be included in the Charter? This view, hinted at by the Commission, even before the adoption of the Charter,[32] appears to have been largely endorsed by the Advocate

---

[31] Lammy Betten: "The EU Charter of Fundamental Rights: a Trojan Horse or a Mouse?", *International Journal of Comparative Labour Law and Industrial Relations*, 17 (2001), pp. 151–164, at p. 161.

[32] See Communication from the Commission on the legal nature of the Charter of fundamental rights of the European Union, COM/2000/0644 final: "(…) It is reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature. As the Commission

Generals of the ECJ,[33] and by the Court of First Instance. The latter has already referred to the Charter in more than one instance,[34] and in the recent *Jégo-Quéré* decision used it to support a new interpretation of Art. 230 (4) and extend individuals' access to the European Courts in the review of the legality of acts of European institutions.[35] The Court of First Instance appears therefore to be ready to draw legal effects from the Charter even in the absence of its having formal legally binding status. In contrast, the European Court of Justice has so far refused the many 'invitations' by the Advocate Generals to make a reference to the Charter. Its scepticism to the Charter also became particularly clear, when in a decision where it had to decide a question substantially similar to that decided by the CFI in *Jégo-Quéré,* not only did not support the decision of the CFI, but did so *without* any reference to the Charter provision on access to justice that had been referred to by the Court of First Instance. [36] There are two readings that can be made of the ECJ reluctance to accord any weight to the Charter. One is a cynical reading: it is to see in this attitude of the Court an attempt to preserve its dominion over the fundamental rights discourse in the European Union. In other words, to preserve its control over the process of constitutionalisation. The Charter would challenge the Court's creative role and discretionary power in that area, and it would be this that would explain the neglect of the Court in its regard. But a very different reading is also possible. It is to perceive in the reaction of the ECJ a message to the EU political process: the Court is, contrary to the previous view, no longer ready to assume the constitutional

---

said in the European Parliament on 3 October 2000, [9] it is clear that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy acting in concert. [9](…) Likewise, it is highly likely that the Court of Justice will seek inspiration in it, as it already does in other fundamental rights instruments. It can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law."

[33] The most important are: Opinion of Advocate General Tizzano in Case. C-173/99, BECTU [2001] ECR I-4881; Opinion of Advocate General Mischo in Cases C-20 and 64/00, Booker Aquaculture, delivered on 20 September 2001, not yet reported, mainly § 126; Opinion of Advocate General Léger, Case C-353/99, Council v. Hautala, delivered on 21 July 2001, not yet reported, mainly §§ 80-83; Opinion of Advocate General Colomer in Case C-466/00, Arben Kaba, delivered on 11 July 2002, not yet reported, fn. 74. For a detailed analysis of the early judicial references to the Charter see: John Morijn: "Judicial Reference to the EU Fundamental Rights Charter – First experiences and possible prospects", Working Paper 1 of the IUS GENTIUM CONIMBRIGAE INSTITUTE (Coimbra Human Rights Centre), available at http://www.fd.uc.pt/hrc/working_papers/JOHN%20MORJIN.pdf; Agustin J. Menéndez: "Chartering Europe: The Charter of Fundamental Rights of the European Union", F. Lucas Pires Working Papers on European Constitutionalism, WP 2001 / 03, available at: http://www.fd.unl.pt/je/wpflp03a.doc and "Exporting rights: The Charter of Fundamental Rights, membership and foreign policy of the European Union", ARENA Working Papers, WP 02/18, available at http://www.arena.uio.no/publications/wp02_18.htm#_ftn26.

[34] See for instance Menéndez, *supra*, fn. 5.

[35] Case T-177/01, *Jégo-Quéré v. Commission*, Judgment of 3 May 2002, paragraphs 41 to 47.

[36] Case C-50/00, *Unión de Pequeños Agricultores*, Judgment of 25 July 2002. The Court of Justice does not go along with the Court of First Instance.

leadership of the Union and believes that the next steps must be taken by the political process and follow a much more classical form of constitution-making. The Court considers that it is no longer its appropriate role to step into the political process and decide by itself what legally binding value the Charter ought to have.[37] Its refusal to refer to the Charter would, in this case, be aimed at forcing the political process to address, in a complete and appropriate manner, this constitutional issue.[38]

This issue can also be approached from the perspective of the political process. The reluctance to accord legally binding value to the Charter may be explained by three reasons: first, the empowerment that the Charter may give to the judiciary in the control of the acts of the political process; second, to preserve the development and the application of the Charter in the dominion of the political process (it can therefore have legal effects,[39] only those will be primarily determined by political institutions); third, the fear on the part of some States that the Charter can be used to promote a further political and constitutional growth of the Union. Not all the reasons are shared by the same actors. And the same occurs in what explains the emerging agreement at the current Convention on the Future of Europe to give some form of legally binding value to the Charter: there are those that envision such legally binding value as necessary for the Charter to effectively constrain EU powers and the constitutional role of the ECJ; there are others who aspire at such legally binding value (and, particularly, an effective incorporation into the Constitutional Treaty),[40] as the best way to promote the political and constitutional spill-over that they foresee in many of its rights. Once again, the competing constitutional conceptions of the Charter come to life, and the one to prevail will not depend on the simple definition of the Charter's legal status.

C) Constitutional Values (Economic Freedom vs Social Rights)

One of the areas where the Charter is expected to have a higher impact is on the balance between economic freedom and social rights in the European Constitution. Many have noted that social rights have occupied a secondary position in the fundamental rights regime of the EU, compared to the values

[37] Christopher McCrudden refers to this as a possible path to decide on the legal value of the Charter. *Supra*, fn. 3, at p. 14.

[38] I owe this point to a comment by Natividad Fernández Solá.

[39] See Menéndez: *supra*, fn. 5. The Charter may also come to play a particularly important role in soft law areas such as the Open Method of Coordination to measure the both the targets set and the progress in achieving them.

[40] Its textual inclusion in the Constitutional Treaty will reinforce its more ambitious constitutional dimension: its catalogue of rights as a comprehensive political document of fundamental rights to be assured to any European citizen. In this sense see Francisco Rubio Llorente: "Mostrar Los Derechos Sin Destruir la Unión", *Revista Española de Derecho Constitucional*, 64 (2002), pp. 13–52, at pp. 50–51.

of economic freedom, that are promoted by market integration.[41] The core of the European Constitution is related to market integration. To the extent to which this was perceived to be legitimate the Court itself could develop the notion of a European Constitution. Though the Treaty of Rome also contains social provisions (notably, free movement of workers and Articles 136 ff) the core of market integration are the free movement provisions promoting market access to the different national markets. The Court has defined these free movement provisions as 'fundamental freedoms'. The fundamental rights character granted to the free movement provisions and the widening of its scope of action in order to extend European supervision over national regulation and to support the constitutionalisation of Community law has led to a spill-over of market integration rules into virtually all areas of national law and has led some to argue that they should be conceived of as fundamental economic freedoms limiting public power and safeguarding competition in the free market. This dynamic has been reinforced by the patterns of litigation in European law with expression on the fundamental rights discourse of the European Court of Justice. Most cases on fundamental rights decided by the Court of Justice under the doctrine now enshrined in Article 6 (2) addressed economic rights and freedoms, such as the right to property and freedom of economic activity.

At the same time, the status of social rights in the Treaties appeared to be in a subsidiary position. Article 136 EC is the Treaty provision that refers to fundamental social rights, in particular the European and Community Social Charters. Such a systematic position in the Treaties appears to distinguish them from the fundamental rights referred to in Article 6 (2) EU. Other fundamental social rights can be found in Community legislation and in the Treaties (such as equality between men and women) or have resulted from the interpretation of the Court in certain areas (including free movement rules).[42] These references have, however, been limited and rarely has the Court of Justice affirmed, as general principles of Community law, some fundamental social rights. Furthermore, many of the developments that took place in the area of social rights were also closely linked to the objectives of a well functioning common market. They appeared to be mainly aimed at preventing distortion of competition and not to pursue the social values in themselves.[43] The constitutional justification for the social action of

[41] I have made a more in-depth analysis of this issue in "Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU", in Alston, *supra*, fn. 18, pp. 449–472.

[42] Consider how the Bosman decision (Case 415/93, *Bosman*, (1995) ECR I-4921) on free movement of workers indirectly affirms a right to work and to freely choose a job and employment.

[43] It is well known that such was the origin of the principle of equal pay between men and women already inserted in the original version of the Treaty of Rome (Article TEC 141, previously 119). It seems that the enshrinement of this principle in the Treaty was supported by the French government in order to prevent a distortion of competition stemming from different national rules (France had already established such principle in its national law).

the Union has often been dependent on the values of market integration and not on social values that the Union would be constitutionally commanded to promote.[44] In many respects, this rationale still dominates the genetic code of EU social rights, even after the developing of an EU social policy. Social lawyers tend to argue for EU social rights to guarantee a common level playing field that will prevent a race to the bottom of national social rights and policies.[45] EU social rights are not conceived of as rights corresponding to social entitlements that EU citizens can claim from the European polity. They are conceived, instead, either as an instrument of undistorted competition, or as a guarantee that such competition will not affect the level of social protection afforded by the States.

This status quo has had three main consequences: first, social rights have had a lower impact on the fundamental rights discourse developed by the Court of Justice; second, many national social rights and policies have been challenged under the free movement provisions, since the balance between economic freedom and social rights in the European Constitution was largely defined by the balance between market integration and national social rights; third, social values have never fully assumed the status of independent goals for an emerging European polity.

The Charter attempts to correct this social deficit in Europe's constitutional discourse by eliminating the uncertainty regarding the status and position of fundamental social rights in the EU legal order. Social rights are given an important role in the context of the Charter, and they are systematically placed in an equivalent position to other economic rights. Naturally, some of the social rights affirmed by the Charter are immediately effective and judicially enforceable, while others are rights of a programmatic character expressing goals which are to be attained on a gradual basis. The qualification of social rights as 'real rights' (enforceable in courts) or goals will, no doubt, be an issue of contention in the interpretation of the Charter, reinforced by the distinction it makes between rights and principles which, in turn, it does not really identify or define.[46] But that is nothing particular to a European Charter and has, for long, constituted a topic of heated debate surrounding national constitutions. What is more important, in light of the past EU fundamental rights context, is that, be it as rights, principles or goals, social values are effectively incorporated in the EU fundamental rights discourse. Once again, however, the extent of their impact on the European Constitution will depend on the dominant constitutional conception of the Charter. For some, their growing importance will be reflected in their political mainstreaming, the promotion of a more active judicial review of

[44] For a more developed analysis see Maduro, Striking the Elusive Balance, *supra*, fn. 41.
[45] *Ibidem*.
[46] Rubio Llorente, *supra*, fn. 40, at pp. 37–39. The Spanish Constitution, for example, distinguishes between basic rights (Art. 15–29), rights and duties of citizens (Art. 30–38) and guiding principles of economic and social policy (Art. 39–52).

EU acts in light of fundamental social rights and, mainly, in providing States with possible exceptions to free movement rules and their possible deregulatory impact on national social policies.[47] For others, however, such social rights should also legitimise new claims of social entitlements from European citizens with regard to the European polity. This is so even if Article 51 (2) attempts to limit the expansionist effect of fundamental rights by stating that they may not give rise to a new power or task for the Community or the Union. European citizens can still claim new social entitlements from the European Union on the basis of fundamental social rights so long as that claim can be satisfied through the exercise of an existing competence.

D) European Citizenship

It could be expected that the character of the Charter as an exercise in consolidation would determine that it would have no relevant impact on the status of European citizenship. The chapter on citizenship does in effect merely include the rights already present in the Treaties (though, in some cases, they are stated in the Charter in accordance with what resulted from their jurisprudential and legislative developments). Article 51 (1) even appears to make the reference to citizenship rights totally irrelevant in the context of the Charter. It states that the provisions of the Charter "are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". It happens that most of the rights inserted in the chapter on European citizens are primarily directed to the States (…) In order not to make an entire chapter highly irrelevant it is necessary to consider that all cases where Member States can restrict a citizenship right, or are bound to give it effect, are situations where they are implementing Union law for the purposes of Article 51 (1).[48] A further limitation on citizenship rights could be derived from Article 51 (2), that makes clear that the fundamental rights declared in the Charter and that correspond to Treaty rights, are subject to the limits and conditions established therein. Thus, for example, the general right of freedom of movement and residence proclaimed in the Charter would be subject to the conditions and limits to which it is subject in the EC Treaty and, indirectly, the EC legislation to which the Treaty provision refers.[49] This

[47] The ECJ has admitted that fundamental rights can, in some circumstances, justify restrictions on free movement rules. See, notably, Case C-368/95, *Vereinigte Familiapress v Henirich Bauer Verlag*, [1997] ECR I-3689.

[48] Such reading a of Article 51 (1) will also be important in order to maintain the current degree of incorporation of EU fundamental rights in national legal orders, as developed by the ECJ. See *infra*.

[49] Even if given direct effect such a provision still limits the general right of free movement of persons in accordance with the existent legislation referred therein (even if such legislation would have to be interpreted in light of fundamental rights). This appears to be, in effect, the

reflects a basic constraint to which the EU fundamental rights have been subject: many of such rights are proclaimed in the legislation or the EC Treaty and are often seen as fully dependent on the content that is given to them by the EU legislative process. They are not seen as fundamental rights flowing from a constitutional source. This can be presented as the result of the absence of a true fundamental rights policy.[50] Fundamental rights have not assumed the role of constitutional values in the Union that ought not only to control but also to promote and direct its actions. As a consequence, many of the rights the Charter now treats as fundamental rights have existed in the EU legal order as mere rights whose content and even existence was dependent on the ordinary political process. This is also the result of the difficulty to differentiate between the 'legislateur constituent' and the 'legislature ordinaire' in the EU. This creates a tendency to mix the constitutional and legislative tracks and, as a consequence, to also be judicially deferent towards the EU political process (in particular, its legislative process). A further consequence for those rights is that legislative acts that set the conditions for their exercise are not seen as restrictions to fundamental rights but as the instruments of their effective determination. Even though, as we will see, some of the Charter horizontal provisions appear to embody a similar conception, the simple recognition of such rights as fundamental rights can however have a tremendous impact on the conception of such rights, in particular citizenship rights.

As said, Article 51 (2) appears to maintain a restrictive understanding of citizenship rights by stating that the 'rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties'. Can the limits defined by those Treaties include any limits set by legislation if the Treaties so state? If that would be the case, such a provision would in fact challenge the nature of such rights as fundamental rights recognised by the Charter. It would *de facto* derogate from the constitutional protection assured to these rights by Article 51 (1). Such a provision enshrines the idea that fundamental rights have a hard core that cannot be dependent on or challenged by any other exercise of power:

---

interpretation of the Court. See Case C-413/99, *Baumbast*, judgment of 17 September 2002, not yet reported: "[a] citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality."

[50] The absence of such policy and its impact on the overall status of fundamental rights in the EU have been highlighted by Philip Alston and Joseph H. H. Weiler: "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", in Alston: *supra*, fn. 18, pp. 1–66.

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

What if the conditions and limits defined by the Treaties or the legislation referred therein do not meet these requirements? A true fundamental rights conception of citizenship rights will impose an epistemological shift on their process of discovery and application: it will be those rights that ought to serve as criteria to judge the admissibility of the legislation that develops or restricts them and no longer the legislation that serves as criteria to determine the existence and extent of such rights. If this seems abstract, it is sufficient to look at one of the most relevant citizenship provisions to envision the impact of their conception as true fundamental rights such as that which must be embraced by a full constitutional reading of the Charter. The free movement of persons is proclaimed in the EC Treaty and restated in the Charter as a fundamental right. Does not the exclusion of some people from this right of residence arising from the conditions imposed by current EC legislation[51] affect the essence of the freedom of movement and residence? Does not the essence of that right entail the free movement of persons without discrimination on the basis of their economic status? If that is the case, then the Charter will require both a new interpretation of Article 18 EC and eliminate the lawfulness of some of the conditions currently imposed by Community legislation on the free movement of persons.

III . The Charter and Political Identity

The third constitutional dimension of the Charter pertains to its possible role in forming a European political identity[52]. In other words, its potential for polity building in the European Union. Many of the issues previously dealt with in this chapter will determine that potential. In this section, I will address this question from a more general perspective, albeit touching again upon issues previously mentioned. The polity building ambition of the Charter is well described by McCrudden:

> The function of a Charter of Rights is partly constitutional in that, like other modern national constitutions, it attempts to

[51] Usually considered safeguarded by Article 18 EC as the Court itself. See above.
[52] See also chapter 11 in this volume.

> identify the basic values that Europe is committed to. Recognising a common set of rights in a document that all can commit to, at least in part, is seen as an important element in building a new political society, providing the possibility of common identification by all with a basic set of values if not with the institutions of the Community.[53]

Will the Charter promote a common European political identity capable of sustaining and reinforcing the process of European integration? And what is important in assessing the polity building perspectives generated by the Charter?

The same author notes that the broader and more legally binding the set of rights to be included in the Charter the higher will be its potential for building political identity in Europe.[54] But even here, one can find opposite perspectives noting that the Charter, in its consolidation process of a wide variety of legal sources of different ranking, may be seen as compiling both fundamental rights and other rights of a non-fundamental character which could undermine rather than support its constitutional power.[55] One author has defined the Charter, in such a context, as a "complex (pre-) constitutional document".[56] Either way, the Charter does appear to reflect an overarching consensus on what the European common political values are. This assumption of the Charter as reflecting values that are common to all European States has already expressed itself in the references of two national constitutional courts. The Spanish Constitutional Court was, in effect, the first judicial body to refer to the Charter.[57] More recently also the Italian Constitutional Court has showed its adherence to the Charter.[58] But is it sufficient for the Charter to be seen as expressing a set of common European political values for it to have true polity building potential? How can those common political values be transformed into building blocks of an emerging European political community?

In this respect, I believe it is important to distinguish between two different sets of rights that a Charter of Fundamental Rights could foster in the European Union: Rights that European citizens may be granted *vis-à-vis* the EU institutions and rights that they may be granted by the European polity. This does not exactly correspond to the dichotomy of negative and

---

[53] *Supra*, fn. 3, at p. 21.
[54] *Ibidem*. He notes that "a broad-based list of rights can thus enable a set of common values to be identified that transcends the Member State, offering an alternative vision of the future".
[55] Von Bogdandy, *supra*, fn. 21, at p. 1317.
[56] Arnold Rainer: "A Fundamental Rights Charter for the European Union", *Tulane European and Civil Law Forum*, 15 (2000–2001), pp. 43–60, at p. 47.
[57] Even before the Charter had been adopted: Judgment 292/2000 of 30 November 2000, available at http://www.tribunalconstitucional.es/STC2000/STC2000-292.htm.
[58] Judgment 135/2002 of 11 April 2002, para. 2.1, available at http://www.cortecostituzionale.it/pron/rp_m/pr_02/pr_02_m/pron_h_02.htm

positive rights. This is so because the European polity can grant European citizens both positive and negative rights *vis-à-vis* their national institutions. The first set of rights simply guarantees that European citizens will not see their sphere of personal autonomy (in civil, political but also social and economic terms) diminished by the powers granted to EU institutions. It guarantees the national status quo of fundamental rights protection. The second set of rights regards, instead, any new rights that European citizens may claim from European institutions or from Nation States through EU law. They may include the expansion of the scope of political and civic rights with regard to Nation States (for example, electoral rights, non-discrimination on the basis of nationality or, in some respects, the free movement of persons) or even new instruments for their protection (EU review of national acts with regard to fundamental rights). But they also include new social, cultural and economic entitlements that European citizens may claim from European institutions (for example, free movement rules and their link to economic freedom or emerging social rights such as those regarding working conditions and possibly in the future even distributive justice in Europe).

The relevance of distinguishing between these two sets of rights lies in their relation to the development of a political community in the EU. Rights given to EU citizens to protect them from EU institutions are aimed at providing regime legitimacy.[59] They guarantee that the actions of those institutions will not threaten the degree of fundamental rights protection that is accorded to European citizens by their States. EU institutions will act in accordance with the fundamental rights that are inherent in any constitutionally democratic system. Further, the recognition of economic and social rights, in this context, is simply aimed at preserving the social and economic status that citizens are granted by their States. But such a set of rights will not have a substantial effect in terms of polity building. They don't justify the need for a new polity, they simply assure that such a new polity will not threaten the fundamental rights linked to the States. The building of polity legitimacy requires the second type of rights: rights derived from the European polity and not to be opposed to it. It is in these new rights that citizens can find the added value of European integration with regard to their national polities. But it is in this respect that the Charter is more disappointing. This is so because this second dimension would require the discussion of much more contentious issues regarding what ought to be the

[59] The distinction between regime legitimacy and polity legitimacy (see below) was advanced by Richard Bellamy and Dario Castiglione (see "Normative Theory and the European Union: Legitimising the Euro-Polity and its Regime", in Lars Tragardh (ed.): *After National Democracy: Rights, Law and Power in the New Europe*, (Hart: Oxford, forthcoming) and recently also used by Neil Walker: "The White Paper in a Constitutional Context", in the Jean Monnet Chair Working Paper 6/01 (available at http://www.jeanmonnetprogram.org/papers/01/011001.rtf). The meaning in which these expressions will be used in here does not totally coincide with the meanings attributed to the expressions by these authors.

fundamental rights policy of the EU, or even if there ought to be such a policy.

The debate on the elevation of fundamental rights into commanding principles of the *telos* of the European Union is not really solved by the Charter. The proposal of Phillip Alston and Joseph Weiler to raise human rights to the status of a proper EU policy[60] and a dominant goal of its activities has not been discussed at either the Charter Convention or the EU political process. This is not surprising given that taking that a step will possibly lead to a debate on the present consequences for the political characterisation of the Union that some simply refuse and others fear.[61] Even if in their specific proposals, Alston and Weiler try to present the creation of EU fundamental rights policy as not requiring substantial changes in the law and the balance of power of the Union, the simple raising of human rights to the status of telos of European integration will change its entire constitutional dynamics. That status would lead to the exploration of the full potential of the Union as a new political community entrusted with the promotion of fundamental rights. That would, in turn, ignite the debates which are linked to the second type of rights mentioned above. These debates would have to address quite contentious issues such as the content of European citizenship and the incorporation of EU fundamental rights in the domestic order of the States. In this respect, the Charter strictly followed its mandate of mere consolidation of the previous status quo. That means, however, that it does not really elevate fundamental rights to a dominant policy for the Union.[62] Whether or not its ambitious catalogue can promote a discourse on fundamental rights that will later be conducive to the creation of such a policy remains to be seen.

IV. The Charter, Constitutional Authority and the Character of European Constitutionalism

The fourth and final area of constitutional impact of the Charter will be the relationship between the EU legal order and national constitutions. This is the question of ultimate legal and political authority in Europe, or, if you prefer, the question of sovereignty. In this respect, it has become common to characterise the relationship between European and national constitutionalism as a form of legal pluralism.[63] This is so, because both national and European

---

[60] Alston and Weiler, *supra*, fn. 50.

[61] Armin von Bogdandy has made a powerful defence of the current system. See: *supra*, fn. 21. His article can be regarded as a reply to Weiler's and Alston proposal.

[62] *Ibidem*.

[63] See Neil MacCormick: "Beyond the Sovereign State", *Modern Law Review*, 56 (1993), pp. 1–18 (the leading article); Chaterine Richmond: "Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law", *Law and Philosophy*, 16 (1997), pp. 377–420; Mattias Kumm: "Who Is the Final Arbiter of Constitutionality in Europe?", Harvard Jean

constitutional law continue to assume in the internal logic of their respective legal systems the role of higher law. According to the internal conception of the EU legal order developed by the European Court of Justice, EU and EC primary law will be the 'higher law' of the Union, the criterion of validity of secondary rules and decisions as well as that of all national legal rules and decisions within its scope. Moreover, the Court of Justice is the higher court of this legal system. However, a different perspective is taken by national legal orders and national constitutions. According to such courts, the supremacy of Community law is established by a norm belonging to the national legal system, and more specifically, by a national constitutional law. This means that the true higher law keeps on being part of the national legal system, and similarly, the ultimate adjudicator is expected to be the national constitutional court. In this way, the question of ultimate legal authority has different answers in the European and in the national legal orders.

Possibilities of conflict have therefore always been present in the relationship between EU law and national constitutions, and one of the areas most susceptible to conflict is regarding fundamental rights. On the one hand, it is well known that the development of a system of fundamental rights protection in the European Communities was, in part, linked to the potential challenges arising from the German and Italian constitutional courts to the supremacy of Community law in cases of possible fundamental rights violations.[64] Following the European Court of Justice's recognition of fundamental rights as general principles of Community law to which all EU acts ought to be conformed, those national courts have partially retracted from their claim to review the validity of EU acts in light of national fundamental rights. But they have continued to affirm that hypothesis in case of either systematic fundamental rights violations or particularly serious violations.[65] On the other hand, the Court of Justice has always affirmed, without exceptions, the absolute supremacy of EU law even in face of national fundamental rights or constitutional norms.[66] This state of affairs has always been presented as a clear example of the form of legal pluralism on

---

Monnet Chair Working Papers 10/98, available at www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-10-.html; Neil Walker: "The Idea of Constitutional pluralism", *Modern Law Review*, 65 (2002), pp. 317–359 (only pp. 319–333); Neil Walker: "Postnational Constitutionalism and the Problem of Translation", in Joseph H. H. Weiler and Marlene Wind (eds.): *European Constitutionalism beyond the state*, Cambridge, Cambridge University Press, forthcoming 2003; Miguel Poiares Maduro: "The Heterenonyms of European Law", *European Law Journal*, 5 (1999), pp. 160–168, and "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in Neil Walker (ed.): *Sovereignty in Transition* (Oxford: Hart Publishing 2003), forthcoming.

[64] For all, see Bruno de Witte: "Community Law and National Constitutional Values", *Legal Issues of European Integration*, (1991/2), pp. 1–22.

[65] For developments see Maduro, *supra* (2003), fn. 63.

[66] This has been clearly affirmed by the Court since Case 11–70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, (1970) ECR 112.

which the relationship between EU law and national constitutions has been built. When we distance ourselves from the hierarchical understanding of EU and national law, the characterisation of such a relationship requires a conception of the law which is no longer dependent upon a hierarchical construction and a conception of sovereignty as single and indivisible. Such a conception of sovereignty has been under challenge by notions such as shared sovereignty but what the relationship between the EU and national legal orders brings is an even more challenging notion: that of competitive sovereignty. We can talk of constitutional pluralism to describe these competing claims of legal and political authority that relate between themselves in a non-hierarchical discourse. Does the Charter impact on this European constitutional pluralism? Does it alter the current equilibrium of constitutional authority between the EU and national constitutions on which fundamental rights have played a major role? Again, there are two possible readings of the Charter in this respect that can, in turn, be linked to the two broader constitutional discourses that have been identified.

A first reading, and a reason of great concern for some, will depart from Article 53 of the Charter. On its face, it appears to recognise the supremacy of national constitutions over EU law in the area of fundamental rights. In fact, it states that:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, (…) by Member States' constitutions.

Such a provision might indicate that where national constitutions would provide a more extensive protection in the area of fundamental rights their provisions would prevail over EU norms. It would therefore reinstate the authority of national constitutions over EU law in certain circumstances. Article 53 restricts such supremacy of national fundamental rights to "their respective fields of application" but it is difficult to conceive this as referring to its exclusive application to national acts. This is so because Article 51 already fulfils that function. The latter provision is aimed precisely at protecting the field of application of national fundamental rights by excluding national acts from the jurisdiction of the Charter. That being the case, Article 53 would be superfluous, if applicable only to national acts.[67] Yet, the drafting history of the provision[68] and all the weight of the EU law *acquis* oppose any interpretation that might risk undermining the uniform application of EU law. It cannot be expected for EU law to implode its own

[67] In this sense also Liisberg, *supra*, fn. 12, at p. 1191–1192.
[68] See, for a detailed analysis: Liisberg, *supra*, fn. 12, at p. 1181 ff.

foundations.[69] It may be that some national constitutional courts will attempt to rely on that provision to support some challenges to the absolute supremacy of EU law but it does not appear that the provision ought to be interpreted as such from the point of view of the EU legal order. That would constitute a complete legal revolution in the internal conception of the EU legal order and its sources of law. A revolution the Charter was not supposed to undertake and that, in the absence of any further evidence, cannot be assumed to have undertaken. It is sufficient to interpret Article 53 literally to prevent any recognition of national constitutional supremacy over EU acts even if that may make it superfluous in light of Article 51.[70] It is not uncommon for legislators to repeat themselves.

In a totally different sense from the threat to supremacy feared by some, it has also been argued that the Charter will, instead, strengthen the supremacy of EU law. This is so because it will remove any reason for national constitutional courts to make the application of EU law dependent on national fundamental rights.[71] In this second light, the Charter becomes an instrument to reinforce the authority of European constitutionalism vis a vis national constitutions. It relieves the European constitution of its dependence on national constitutions and it gives it, instead, independent constitutional authority. Again, we have a different constitutional discourse taking precedence: the Charter further constitutionalises the EU and, in so doing, reinforces its constitutional authority vis a vis national constitutional orders.

There is a further issue where, albeit in a less obvious and discussed manner, the Charter may end up having a much more profound impact on the nature of European constitutionalism. Traditionally, Europe's constitutionalism has been built in a bottom-up sense. It is national constitutional sources that shape the European Constitution and not vice-versa. This was a consequence of the dependence of the process of constitutionalisation on national legal orders and national courts. The legitimacy of the constitutional reading undertaken by the Court of Justice was supported by the reference to national constitutions and their common legal principles. At the same time, the Court was also aware of the potential for national constitutional control over EU law and, as a consequence, tried to adapt EU law to national constitutions. In this respect, the EU legal order constitutes a quite different federal legal order: both constitutional authority and constitutional values are installed from the smaller units into the federal entity and not the opposite. The European Constitution appears, in this light, as a result of a permanent learning process inspired from national

[69] Rubio Llorente: *supra*, fn. 40, at pp. 43–44, who argues that it would be so even if it where up to the Court of Justice to determine and apply the level of protection afforded by the national constitutions.

[70] Even more strongly Rubio Llorente talks of a an empty or plainly wrong provision! See: *supra*, fn. 40, at p. 44.

[71] Sacerdoti, *supra*, fn. 19, at p. 48.

constitutions that constitute both its ultimate source of legitimacy and its constitutional laboratory.

In some sense, the Charter can be seen as challenging both the discursive and bottom-up character of European constitutionalism. The creation of an independent constitutional source from national constitutions and the formalisation of European constitutionalism it entails both appear to threaten those two trademarks of European constitutionalism. Joseph Weiler has strongly criticised the formalisation of European constitutionalism inherent in the Charter as changing one of the highest added values of European constitutionalism: its ongoing development by the ECJ from constitutional principles derived from national constitutions.[72] Others, instead, argue that the best way to pursue such constitutional pluralism is through the Charter and the constitutional dialogues it will promote, albeit with a lower degree of judicial dominance. This view stresses a less Court oriented vision of the European Constitution that is seen as the product of a broader set of institutions and reflecting a broader political consensus. The Charter, in turn, is seen as an instrument for the future developing and updating of such a political consensus and not as an arrival point that crystallises the current fundamental rights *acquis*.[73]

Conclusion

From what has been said as to what the Charter is or will be depends very much on which 'constitutional life' will be adopted. There are two very different Charters in the current document depending on how the constitutional discourse is used for its legal dogmatic reconstruction. One discourse places the Charter at the centre of the political building of Europe and foresees it as a dynamic element for further constitutionalisation. Another presents the Charter as a limit to the political growth of Europe and conceives of it as a tool for the protection of national constitutional values. To determine which one of these discourses ought to dominate the reading of the Charter will be, at least, as important as determining the formal legal value to be given to it. There is nothing dramatic about this. It is common for constitutional agreements to be made on the basis of what Sunstein has called incompletely theorised agreements.[74] In these instances, constitutional norms and constitutional principles do not offer solutions but simply regulate the constitutional discourse by setting their margins and the acceptable arguments. This means that the Charter will be as much a product of its text

[72] See Weiler, *supra*, fn. 24.
[73] This appears to be the view, for example, of Menéndez: *supra*, fn. 5. See also McCrudden, *supra*, fn. 3, at pp. 6, 7, and 10.
[74] Cass R. Sunstein: "Incompletely Theorized Agreements", *Harvard Law Review*, 108 (1995), pp. 1733–1772

as of its discourse and the institutions that will dominate it. In this respect, intentions and outcomes may differ greatly. It is sufficient to recall that in the United States, the insertion into the Constitution of a catalogue of fundamental rights was mainly argued by those that opposed the powers of the federation. Yet, the Bill of Rights ended up constituting one of the most important elements of federal control over the states.

In the EU the political ambitions of the more ambitious constitutional discourse on the Charter appear to be constrained by the fears of some States. The Convention itself, with its focus on institutional questions and regime legitimacy, also appears to limit the constitutional promise of the Charter. But, as always in the process of European integration, the non-formalised constitutional dynamics may determine a constitutional future for the European Charter of Fundamental Rights much more 'glamorous' than the limited dimension that currently appears to be prevailing. The masters of the Treaties may again find themselves in the position of the theatre producer in Mel Brooks' play and movie *The Producers* that ends up with an unintended hit in his hands: "How could this happen? I was so careful. I picked the wrong play, the wrong director, the wrong cast. Where did I go right?"

Chapter 11

The European Charter
Between Deep Diversity and Constitutional Patriotism

John Erik Fossum

Introduction

The European Union, as noted in the Laeken Declaration, is at a critical crossroads.[1] Enlargement, and thus a much larger and more diverse EU, is imminent. Under the shadow of this profound change, the EU has launched a broad and deep process on the fundamentals of the Union, which is to help it in its efforts to grapple with the challenges ahead. Two sets of processes may thus converge: One is the adoption of new members, as a vital step to the end of the division of the European continent. This decision to include ten new Member States in May 2004 is a decision of major constitutional significance.[2] The other process is the forging of a constitutional and institutional framework that can carry these changes and that can also provide a clearer sense of the nature of the polity and the fundamental principles that this is to be based upon. A critical question here is what type of allegiance the entity requires, in normative terms, as well as what it can actually draw on and foster, in empirical terms.

The essential principles that the Union has referred to in the treaties are "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".[3] These principles are central requirements of democratic legitimacy, and although they emerged in Europe, they have been spread worldwide. They are also universalistic, in that they provide few, if any, clues to the specification of a unique *European* identity. Efforts to establish a set of values that are reflective of a particular and uniquely European identity and sense of self, have met with strong opposition. Nationalists defend their national identities and their nationally based conceptions of the good life.

---

[1] European Council: *Laeken Declaration on the future of the European Union*. http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

[2] Joseph H. H. Weiler: "A Constitution for Europe? Some Hard Choices", *Journal of Common Market Studies*, 40 (2002), pp. 563–580. Erik O. Eriksen, John E. Fossum, and Helene Sjursen: "Widening or reconstituting the EU? Enlargement and democratic governance in Europe", *mimeo, on file with the author.*

[3] Article 6 (1) TEU.

The challenge facing the EU is that of reconciling three sets of concerns: the first is the commitment to a set of universal values, the second is the quest for a particular European identity, and the third is the protection and promotion of *national* (and other, such as regional) difference and distinctness.

Charters as Bills of Rights establish or entrench fundamental rights, democracy and the rule of law, and the relevant sense of allegiance and attachment is *constitutional patriotism.*[4] Such a type of support is *post-national* and derived from basic principles, rather than pre-political values and attachments steeped in a culture, tradition, or way of life. Individual rights are critical components of this mode of allegiance, through the manner in which we recognize other persons, as holders of rights. Rights can ensure both an individual sense of self and a collective sense of membership of a community. Does the Charter of Fundamental Rights of the European Union rest on and seek to foster constitutional patriotism?

The EU, as noted, is faced with the challenge of relating to its very complexity and the staunch defence of national (and regional, infra-national and other) identities. These facts make it highly unlikely that it will ever establish a set of allegiances and attachments similar to those of the nation-state.[5] The EU is an extremely complex *multinational* and *poly-ethnic* entity. The relevance of this fact is compounded by the lack of consensus as to what the EU is, and ought to be. The structure of the EU also leaves the Member States (and regions) with a pivotal role in determining its future, including the determination of the underlying principles and mode(s) of allegiance. To what extent is the diversity of Europe recognised as an element to be promoted and protected? More specifically, how reflective of the diversity of Europe is the Charter? The relevant mode of allegiance that I draw on to respond to this question is Charles Taylor's notion of *deep diversity*.[6] With deep diversity is understood a situation of a multitude of different collective goals and conceptions of the polity. Groups and collectives have different relations to the overarching entity; there is no overall agreement on what the country (or polity) is for; and there are different collective goals as to what the society ought to be and ought to look like.

---

[4] Jürgen Habermas: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.* (Cambridge, Mass.: The MIT Press 1996), pp. 465 ff; Jürgen Habermas: *The Inclusion of the Other* (Cambridge: Polity Press 1998), Jürgen Habermas: "Struggles for Recognition in the Democratic Constitutional State", in Charles Taylor and Amy Gutmann (eds.): *Multiculturalism* (Princeton, N.J.: Princeton University Press 1994); Attracta Ingram: "Constitutional Patriotism" 22 (1996) *Philosophy & Social Criticism*.

[5] Gerhard Delanty: *Inventing Europe – Idea, Identity, Reality* (London: MacMillan 1995); John E. Fossum: "Identity-politics in the European Union", *Journal of European Integration*, 23 (2001), pp. 373–406.

[6] Charles Taylor: *Reconciling the solitudes: essays on Canadian federalism and nationalism* (McGill-Queen's University Press 1993).

What type of allegiance is the Charter based on – constitutional patriotism or deep diversity? This question will be addressed by looking at the preamble of the Charter, its provisions, and its anticipated and currently envisioned role within the EU. The latter issue requires attention as the Charter is, formally speaking, a political declaration and not a legally binding document. Its status is to be decided before 2004. The work and results from the Convention on the Future of Europe will likely give vital inputs into this decision. This convention, the so-called *Constitutional Convention*, has as its mandate, among other items, to discuss the incorporation of the Charter into a future European constitution. A specific working group was set up to assess this question and has delivered its recommendations.

A critical test of whether the EU has embraced a Charter-based constitutional patriotism is for such a commitment to have been carried forth into the deliberations of the Convention and reflected in the output from this body. At the present stage of the Convention's work, the relevant sources to be assessed include the constitutional proposals, the recommendations of the Charter Working Group, and the plenary debates. Conversely, if the EU has endorsed the spirit of deep diversity, this will be reflected in the status of the Charter (non-binding), as well as in the scope for difference/diversity expressed in those same sources.

A Charter, however important as a means of fostering constitutional patriotism, is no sufficient test. To properly foster constitutional patriotism, certain institutional and formal procedural requirements, in addition to fundamental rights, are required. Even more so, to assess the scope and salience of deep diversity, such institutional factors are essential. The two perspectives differ on how they conceive of the constitution. The former, constitutional patriotism, sees constitution in terms similar to those of the democratic *Rechtsstaat*, whereas deep diversity can be consistent with a constitutional treaty made up of Member States. The chapter examines two constitutional proposals, respectively reflective of constitutional patriotism and deep diversity, in more in-depth, so as to shed further light on the nature and direction of the thinking in the Convention.

This chapter is divided in five parts. Part One is the introduction. Part Two presents constitutional patriotism and deep diversity, as alternative approaches to the fostering of allegiance in Europe. Part Three briefly presents and assesses the Charter against the two notions of constitutional patriotism and deep diversity. Part Four assesses the relevant aspects of the Constitutional Convention. Part Five holds the conclusion.

I. Constitutional Patriotism vs. Deep Diversity

"The contextualisation of democratic values and human rights in a constitutional structure permits the willing acceptance of a system of

authority embedded in the constitution and this is what holds people together and makes for their *constitutional patriotism*".[7] This sense of allegiance is not derived from pre-political values and attachments steeped in a culture, tradition or way of life, but in a set of principles and values that are universal in their orientation. Constitutional patriotism elicits a *post-national* and rights-based type of allegiance. However, constitutional patriotism is more than attachment to abstract principles. It is a mode of allegiance because it elicits support and emotional attachment, through a set of universalistic principles that are *embedded in a particular context*. Hence, people derive their attachments from the manner in which a set of universal principles are interpreted and entrenched within a particular institutional setting, how they are fused with a particular set of values steeped in a particular geographical setting, and how they are embedded within a particular set of traditions. The universal principles help entrench a set of procedures that, when made to operate within a particular context, render it self-reflective, and hence responsive to contextual changes. Constitutional patriotism thus provides one set of answers or recommendations for how to reconcile universal values with context-specific ones, whilst also retaining sensitivity to difference and diversity.

Constitutional patriotism is based on universal rights steeped within a particular legal community. There are three central components to this. The first relates to rights, the second to institutional conditions, and the third to the constitutional framework or the status of the constitution.

With regard to rights, constitutional patriotism presupposes a firm commitment to personal autonomy, in the sense of both private *and* public autonomy – as both are required for democracy. This means private protective rights and political participatory rights. Further, social rights are also important in that they both help ensure autonomy and also foster a deeper sense of solidarity. The Charter must also contain cultural rights, as part of a commitment to and provisions for the respect of diversity, albeit in conditional form rather than in an absolute one. The underlying principle is the notion of "the reciprocal recognition of different cultural forms of life".[8]
Second, with regard to institutional conditions, constitutional patriotism presupposes that the Charter, and the Constitution of which it has to be part, contain a set of institutional prescriptions that ensure that citizens can see themselves as the ultimate authors of the law. This means representative bodies that can transform popular deliberations into binding decisions in a manner consistent with the spirit of these deliberations. This also speaks to the division of competences, congruence and accountability. In complex entities the vertical and horizontal division of competences must be such

[7] John E. Fossum: "The European Union – In Search of an Identity", *European Journal of Political Theory*, 2 (2003), forthcoming.
[8] Habermas, *supra* (1998), fn. 4, pp. 118–119.

construed as to ensure that the basic criteria of congruence and accountability are maintained, not through excessive centralisation but through a vertical division that is consistent with the location of problems and the means to their solution.

Third, with regard to the constitution, the strongest and clearest expression of constitutional patriotism, in substantive and symbolic terms, is through the full incorporation of a Charter of Rights in the constitution. This gives it high visibility and unambiguous status as an intrinsic part of the constitution, and status as 'higher' law. Applied to the European setting, an unambiguous expression of constitutional patriotism is found in the explicit pronouncement of a *European constitution*, and not a European constitutional treaty, and one that is both fully recognised and acknowledged as, 'higher' law.

In both substantive and symbolic terms, the framers' inclusion of a strong and comprehensive commitment to rights in the constitution serves to direct subsequent constitutional interpreters to ensure that these provisions are heeded and also that the other provisions in the constitution are made to cohere with this strong commitment to rights. As noted above, this pertains for instance to the provisions on institutional make-up and to the division of powers and competences. Constitutional patriotism also presupposes that the universal orientation of the rights is somehow protected, for instance through provisions that ensure compatibility with individual rights protection at the global or cosmopolitan level. A further requirement of constitutional patriotism is that constitutional amendment be consistent with the principle of popular sovereignty. This entails a commitment to some majoritarian formula. No single Member State can have veto power over constitutional change.

A) Deep Diversity

The notion of deep diversity refers to a situation where a "plurality of ways of belonging (…) [are] (…) acknowledged and accepted (…)"[9] within the same state. That this diversity is accepted means that special political-legal and even constitutional measures have been devised to preserve and promote it. Deep diversity has as its philosophical basis the communitarian position that rights are inadequate as means of fostering a sense of community and belonging. One reason for this is that the law and rights are always steeped within a particular cultural setting that provides people with deep-seated cues as to who they are and what is good and valuable.[10]

---

[9] Taylor, *supra*, fn. 6, at p. 183.

[10] See Charles Taylor: *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press 1989); Charles Taylor: "The Politics of Recognition", in Charles Taylor and Amy Gutmann (eds.): *Multiculturalism* (Princeton, N. J.: Princeton University Press 1994); Charles Taylor: *Philosophical Arguments* (Cambridge, MA: Harvard University

In legal-political terms, the notion of deep diversity can be specified using the following criteria. First, the society contains several and different collective conceptions of its cultural or national or linguistic or ethnic make-up, and there is thus no overarching agreement on what the country is for. The EU is a particularly complex multinational and poly-ethnic entity, with a wide range of sources of difference and diversity. Its sheer range of diversity, and the strong sense of *national* identity have prompted many opinion-makers and even decision makers to conclude that there is no European *demos*.[11] This position is shared with many academic analysts.[12]

Second, the existence of different collective goals is an acknowledged and accepted fact and something that is accommodated through differentiated citizenship and other means through which collectives seek to maintain their sense of difference. Joseph Weiler has argued that what sustains the EU as a unique non-state entity is the *principle of constitutional tolerance*. This is premised on the explicit rejection of the One Nation ideal and the recognition that "the Union (…) is to remain a union among distinct peoples, distinct political identities, distinct political communities (…) The call to bond with those very others in an ever closer union demands an internalisation – individual and societal – of a very high degree of tolerance".[13] As Weiler notes in a more recent article, "in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to be bound by precepts articulated, not by 'my people', but by a community composed of distinct political communities: a people, if you wish, of 'others'".[14] The lack of a clear normative hierarchy and sanctioning means, make acceptance and subordination voluntary.

Third, active measures are taken by those that feel different or distinct to maintain this diversity over time. The sense of belonging to the overarching entity, in case of deep diversity, is one in which a group's or collective's belonging passes through its belonging to another smaller and more integrated community.

Press 1995); Charles Taylor: *Identitet, frihet och gemenskap: Politisk-filosofiska texter i urval av Harald Grimen* (Gøteborg: Daidalos 1995). This is a standard communitarian argument.

[11] The German Constitutional Court's ruling, in the famous Maastricht case, was premised on the notion that there is no European *demos*. See Joseph H. H. Weiler: "Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision", *European Law Journal*, 1 (1995), pp. 219–258. European Convention, Contribution by Mr. Jens-Peter Bonde: "The Convention about the Future of Europe", CONV 277/02, at p. 45

[12] See for instance Dieter Grimm: "Does Europe need a Constitution?" *European Law Journal*, 1 (1995), pp. 282–302; Heidrun Abromeit: *Democracy in Europe* (Oxford: Berghahn Books 1998).

[13] Joseph H. H. Weiler: "Federalism without Constitutionalism: Europe's Sonderweg", in Kalypso Nicolaidis and Robert Howse (eds.): *The Federal Vision* (Oxford: Oxford University Press 2001), pp. 54–70, at p. 68.

[14] Weiler, *supra*, fn. 2, at p. 568.

When we apply this notion to the European Charter, we can derive the following criteria. In its strongest or most pronounced form, deep diversity is incompatible with a constitutionally entrenched Charter of rights. By this is not meant that deep diversity is incompatible with individual rights (in particular those rights that ensure private autonomy) but with the explicit entrenchment of the full range of rights in the constitution. Deep diversity is thus compatible with the Charter as a mere political declaration.

If the Charter were to be formally adopted as legally binding, there could still be scope for deep diversity, provided the following requirements were met. First, its underlying philosophy would be accepting of different conceptions and visions of what the EU is, and ought to be. If so, this would be apparent from the statements in the preamble and from the provisions in the text. Second, the Charter would have provisions on differentiated citizenship and other means of acknowledging cultural and national and other forms of difference. Third, the scope of application of the Charter would be very limited and only apply to issues that would not affect the propounding of such forms of difference. Fourth, each member state and other relevant cultural actors would have veto over treaty or constitutional change. Fifth, the Charter and the constitution would be open to actors actively seeking recognition of uniqueness with reference to their unique history, culture, language, and national identity. This could manifest itself in (a) the pursuit of distinct collective visions and group-based rights, (b) opposition to a Charter that would have binding effect, (c) demands for exemptions from the provisions in the Charter, and (d) the setting of standards is considered a national concern.

II. The European Charter

The EU is often conceived of as a 'post-national' entity.[15] Its commitment to those values generally associated with constitutional patriotism – democracy and the rule of law – has become increasingly visible and manifest in the treaties.

In the following pages an assessment of the Charter in relation to the two conceptions of allegiance identified above will be undertaken. This assessment focuses on the preamble and the nature and scope of rights.[16]

---

[15] See Habermas in this volume. See also Jürgen Habermas: *supra*, fn. 4 (1998); Jürgen Habermas: *The Postnational Constellation* (London: Polity Press 2001); Deirdre M. Curtin: *Postnational Democracy: The European Union in Search of a Political Philosophy* (Kluwer Law 1997); Erik O. Eriksen and John E. Fossum (eds): *Democracy in the European Union – Integration through deliberation?* (Routledge 2000). See also Fossum, *supra*, fn. 5.

[16] For a more detailed examination of these aspects of the Charter, from the vantage point of constitutional patriotism and deep diversity, see Fossum, *supra*, fn. 7.The analysis in the article is confined to the Charter Convention. For another complementary assessment, see Chapter 10 in this volume.

First, it is clear from the text of the preamble that the spirit of the Charter is that of rights-based constitutional patriotism. Rights are central ingredients in the EU's attempt to foster a sense of allegiance. The preamble of the Charter reiterates those values appealed to in the Amsterdam and Nice Treaties. It states that

> The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

In the preamble, there is no attempt to circumscribe these values or to render them subservient to a particular European culture or tradition. But this is not akin to saying that these principles are disconnected from any reference and application to a particular European context. The main reference is here, though, social solidarity, not cultural homogeneity.

The preamble also speaks directly to the value of diversity in Europe and it notes that European diversity is valuable:

> The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels.

But this is no wholehearted endorsement of deep diversity, as the protection of national identities must be reconciled with the protection and promotion of common values. The common values appealed to are those associated with constitutional patriotism and with the democratic constitutional state. If pursued to the full, they can help form a European constitutional demos and a political culture that ensure a shared sense of what Europe is for.

The assessment of the drafting of the Charter, its provisions, and the locating of the Charter within the legal-institutional context of the EU, revealed a more complex picture, with regard to the type of allegiance that we can discern from the Charter. The provisions on private autonomy appear no less comprehensive than those of other charters or bills of rights. The provisions to ensure public autonomy, however, are weaker. These are foremost the rights listed in Articles 39 and 40, which provide European

citizens with voting rights and rights to stand as candidate at European and municipal elections. European citizenship, however, is derived through citizenship in a Member State. Thus, far from all those resident in the Union can obtain citizenship, and as national incorporation rules differ substantially, the rights in institutional terms are quite differentiated. Ulrich Preuss has noted that

> Union citizenship is not so much a relation of the individual vis-à-vis Community institutions, but rather a particular legal status vis-à-vis national member states, which have to learn how to cope with the fact that persons who are physically and socially their citizens are acquiring a kind of legal citizenship by means of European citizenship without being their nationals.[17]

The citizenship provisions in the Charter are inadequate to ensure public autonomy. However, Union citizenship, it should be noted, is a dynamic concept and its status does depend on the nature and direction of the larger process of European integration.

There are strong provisions for citizens' private autonomy in the text of the Charter. But their effect in ensuring private autonomy will be circumscribed if the pillar structure of the treaties is retained.[18] Thus, the Charter in its present form, and within the context of the present treaties, cannot credibly be said to produce the essential *mutually reinforcing* character of private and public autonomy, which constitutional patriotism presupposes. The first requirement of constitutional patriotism is thus not fully complied with, partly due to the Charter and partly due to the structure in which it is to be situated (the second criterion of constitutional patriotism). A similar argument applies to social rights. The Charter holds numerous provisions on social rights. Their salience depends on the entrenchment of a notion of social Europe within the Communities' socio-economic structure. There are some important traits of this, which help provide the constitutional patriotism of the Charter with a stronger ethical foundation. Respect for diversity is voiced in the preamble and further greatly reinforced through the institutional system of the EU and the treaties. In fact, the sheer diversity of the EU, in structural-institutional, as well as cultural terms, can work as a great deterrent to the very fostering of constitutional patriotism. On the third criterion, that of higher law, the Charter was presented as a political

---

[17] Ulrich K. Preuss: "Citizenship in the European Union", in Daniele Archibugi, David Held, and Martin Köhler (eds.): *Re-imagining Political Community* (Cambridge: Polity Press 1998), pp. 138-51, at p. 148.

[18] European Commission: "Affirming Fundamental Rights in the European Union – Time to Act", *Report of the Expert Group on Fundamental Rights*, Brussels, Employment, Industrial Relations and Social Affairs (1999), at p. 12.

declaration but there is strong evidence to the effect that it will become binding. It has already become part of the sources of legal interpretation.[19] Its constitutional status depends on the outcome of the Convention's deliberations and their subsequent fate in the forthcoming IGC 2004.

Given that there is a strong commitment to the protection of the cultural diversity of Europe in the preamble, the Charter was also assessed in terms of its compliance with the criteria for deep diversity. Might the spirit of the Charter better be labelled that of deep diversity? Deep diversity, as noted, presumes an absence of overarching agreement of what the EU is for. It also presumes differentiated citizenship. The Charter does not introduce or endorse the notion of differentiated citizenship, albeit the fact that the incorporation rules are based on national citizenship provisions does instil a de facto element of differentiation. However, neither the spirit of the Charter, as revealed in the preamble, nor the provisions on citizenship suggest that the Charter was *framed* in the mindset of deep diversity.

Once we look at the actual provisions in the Charter, and the setting of the EU, we find a strong *de facto* diversity awareness that is more pronounced than in the preamble. Of particular importance is the considerable scope for exemptions and the large room for national standards entrenched in the horizontal clauses (articles 51–52). Consider for instance Article 51, which refers to the scope of the Charter. This provision states that it only applies to the EU institutions and to the Member States, insofar as they implement Union law. Article 52(2) states that "Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties." The gist of Articles 51 and 52(2) is to leave the Member States with a lot of scope. In formal terms they are also the ones who set the terms of their own interaction through being 'masters of the treaties'. The Charter builds upon existing rights, many of which are in the treaties and in the constitutional traditions of the Member States. The Charter, through Articles 51 and 52, is confined to the limits set by the Treaties. Hence, the treaties work as guidelines and serve to confine those provisions of the Charter that have a basis in the treaties.

Having said that, whilst these provisions clearly leave a lot of room for diversity protection and promotion, the spirit of the Charter is not that of deep diversity. It contains a clear commitment to constitutional patriotism but is steeped within the highly complex European setting, one that is very conscious of the diversity of its past and of its present, and that is highly protective of its variegated traditions.

---

[19] See Chapter 2 in this volume. See also Agustín J. Menéndez: "Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union", *Journal of Common Market Studies*, 40 (2002), pp. 471–490.

These comments serve to underline that the Charter does not offer an adequate test of the allegiance forming ability of constitutional patriotism. The Charter has, however, served to bring this debate and process forward. For one, it served as a vital precursor to, and model for, the Convention on the Future of Europe, or the Constitutional Convention.

The explicit endorsement of constitutional patriotism in the Charter can serve as an impetus and guideline for the Convention in its further efforts at constitutionalising the EU. The clear commitment to constitutional patriotism in the Charter can serve to move the EU further in its promotion of a rights-based sense of allegiance. The question we now turn to is whether this spirit permeates the work of the Convention and the constitutional proposals that have been presented thus far to the Convention - or whether these are all more reflective of the spirit of deep diversity.

III. The Convention on the Future of Europe

At the Laeken European Council in December 2001, the decision to establish a Convention on the Future of Europe was announced. The declaration contains the Convention's mandate, which is to "consider the key issues arising for the Union's future development and try to identify the various possible responses". [20] One of the central components of this broad mandate is to clarify the status of the Charter. The Laeken Declaration does not spell out a grand vision of the EU. Instead it poses a large number of large and small questions that need to be considered. It does present a clear view on the fundamental mode of allegiance and this is cast within the spirit of constitutional patriotism: "The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions. The national parliaments also contribute towards the legitimacy of the European project."

The establishment of the Convention on the Future of Europe is the single most important sign that the EU is involved in constitution-making, albeit in actual terms it has been involved in such for an extended period of time. The Convention on the Future of Europe was modelled on the Charter Convention, in that both were set up as deliberative bodies. In their composition, both were made up of a majority of parliamentarians (46 out of 66 full members, and 26 out of 39 from the candidate countries), although each Member State also has a government-appointed representative present.

[20] http://www.europa.eu.int/futurum/documents/offtext/doc151201_en.htm

A) The Convention working group on the Charter (WG II)

For the Convention to endorse constitutional patriotism, it should be expected to:

- deliver one constitutional proposal entitled 'Constitution of Europe' or equivalent rather than a constitutional treaty
- which contains a fully incorporated Charter
- where the Charter is revised to bolster provisions on public autonomy and social rights
- where the division of powers and competences are in compliance with personal autonomy,
- and where the provisions for constitutional change are based on the principle of popular and not Member State sovereignty

The question posed to the Convention by the European Council in the Laeken Declaration was as follows: "Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights." The Working Group on the Charter interpreted this in the following manner: "If it is decided to incorporate the Charter of Fundamental Rights in the Treaty: how should this be done and what would be the consequences? What would be the implications of accession by the Community/Union to the European Convention on Human Rights?"[21]

The Chairman of the Working Group set down the following principle for the work of the group: "the Working Group should not get involved in discussion of the major political questions (*whether* the Charter should be incorporated or *whether* there should be accession to the ECHR). It should rather focus on examining the more specific matters outlined below, on the assumption that the two questions will meet with a positive political response."[22] The Chairman thus recommended that the Working Group continue the approach to the Charter in the first Convention, that of treating the Charter *as if* it were to become binding. This suggests that the Working Group was inspired by the notion of constitutional patriotism, in that it sought a legally binding Charter. However, the Chairman's recommendation that the contents of the Charter should not be reopened for debate in the Working Group does not necessarily point in the same direction. The rationale for this recommendation was that the previous Convention had

[21] European Convention, Working Group II: "Mandate of the Working Group on the Charter", CONV 72/02, 2.
[22] *Ibid.*

deliberated over these issues, and there was no point in questioning the legitimacy of the work of the previous Convention.

The members of the Working Group accepted this recommendation,[23] and this was reiterated in the final report of the Working Group.[24] However, some members noted that if the Charter were to become binding, there was a need to take a closer look at the horizontal clauses. There was no strong push to reopen the debate on the Charter to strengthen its autonomy-enhancing role. The Working Group's main focus was on the techniques for incorporating the Charter and the question of accession to the ECHR.

In July 2002, on the question of the constitutional status of the Charter, a majority of the members of the Working Group favoured the insertion of the complete Charter into a new treaty.[25] In October 2002, in its (draft) report to the Convention, the Charter Working Group noted that "all members of the Group either support strongly or are open to giving favourable consideration to an incorporation of the Charter *in a form which would make the Charter legally binding and give it constitutional status*".[26] The Working Group recommended that the Charter Preamble should be preserved and included in a Constitution. It concluded that the Charter would "in no way modify the allocation of competences between the Union and the Member States".[27] This meant that the limited reach of the Charter in the field of social policy, for instance, despite its many provisions on social rights and justice, would not be altered. The Working Group's way of resolving this apparent contradiction is quite interesting: "The fact that certain Charter rights concern areas in which the Union has little or no competence to act is not in contradiction to it, given that, although the Union's *competences* are limited, it must *respect* all fundamental rights wherever it acts and therefore avoid indirect interference also with such fundamental rights on which it would not have the competence to legislate."[28] How the Union then would reconcile a conflict between economic and social concerns appears difficult to establish (although there are grounds to think that economic concerns will predominate). The Working Group stressed that the Charter is forged in the spirit of subsidiarity. This would not seem to resolve the dilemma, simply push it down one or several steps, to be handled

[23] European Convention, Working Group II: "Summary of meeting on 25 June 2002", CONV 164/02,3.
[24] European Convention, Working Group II: "Final report of Working Group II", CONV 354/02
[25] European Convention, Working Group II: "Summary of the meeting held on 12 July 2002", CONV 203/02.
[26] European Convention, Working Group II: *loc cit.*, CONV 354/02. Two options for how to incorporate the Charter as a legally binding document were listed here. A large majority of the Working Group favoured the first option, which was to include the full text of the Charter into the Constitution.
[27] *Ibid*. at p. 5.
[28] *Ibid.*

by the Member States or by the regions or actually defer to the strong market-based thrust of the Treaties.

The Working Group also recommended the EU to accede to the ECHR. On the basis of expert advice, the Working Group came to the conclusion that accession to the ECHR would not undermine the autonomy of Union law. From that we can derive that it would not weaken the legal-institutional basis for constitutional patriotism. The reasons put forward for accession were inspired by concerns with unity, not diversity, and referred to ensuring the same level of protection to citizens, as citizens obtain from the Member States, all of whom have entered the ECHR. ECHR adherence is also a requirement for membership in the EU. Further, accession would help ensure "a harmonious development of the case law of the two European Courts in human rights matters (…)".

A very large majority of the members of the Convention that spoke in response to the Working Group's Report supported the recommendations of the Working Group, both with regard to making the Charter binding, and for the EU to accede to the ECHR.[29] To what extent, then, is this commitment to a binding Charter reflected in the constitutional proposals that have been presented to the Convention?

B) Constitutional Proposals

What is the status of the Charter of Fundamental Rights of the European Union in the constitutional proposals? If all proposals – institutional and personal - seek to incorporate the Charter in the future constitution, this would be critical evidence of the Charter having taken hold, and therefore, it should say something about the constitutional patriotism/deep diversity divide.

Proposal Title	Status of Charter
Proposer: European Convention Presidium Status: skeletal draft Title: Preliminary draft Constitutional Treaty CONV 369/02	Listed under Article 6, three options: - refer to the Charter; - binding Charter with provisions listed in protocol; - all articles of Charter incorporated in the text
Proposer: European Commission: Status: Commission discussion paper on institutional framework and reforms Title: For the European Union – Peace, Freedom, Solidarity COM (2002) 728 final	Charter fully incorporated. Text says: "(S)et out in a constitutional text the values and fundamental rights on which the union bases its action."

[29] European Convention, "Summary report of the plenary session – Brussels 28 and 29 October 2002, CONV 378/02.

Proposer: Elena Ornella Paciotti Status: prepared by Basso Foundation and based on European Parliament texts Title: A draft constitution for the European Union CONV 335/02	Charter fully incorporated in the Constitution under Title I – including preamble
Proposer: Elmar Brok Status: informal discussion paper Title: Constitution of the European Union CONV 325/02	Charter fully incorporated in the Constitution under Part One
Proposer: Garrido/Borrell/Carnero Status: personal proposal by representatives of the Spanish Socialist Party Title: A European Constitution for Peace, Solidarity and Human Rights CONV 329/02	Charter fully incorporated in the Constitution in the First Chapter The Charter should be amended so as "to have a wider reach: it should become the minimum standard of protection for all citizens resident in Europe"
Proposer: Peter Hain Status: Draft prepared by Alan Dashwood et al. – not official UK policy Title: Constitutional Treaty of the European Union	Charter referred to in Article 2 of the constitutional treaty. Status as one of the sources of EU fundamental rights. Commentary says status is unclear: either a legally enforceable Bill of Rights incorporated into the Treaties OR a non-binding point of reference for the institutions
Proposer: Romano Prodi, aided by Barnier and Vitorino and working party Status: feasibility study Title: Constitution of the European Union	Charter is fully incorporated in the constitution under Part Two, Fundamental Rights, with some additional provisions
Proposer: Andrew Duff Status: personal proposal Title: A Model Constitution for a Federal Union of Europe CONV 234/02	Charter referred to in Article 3 and is to be established "as a Protocol to this Constitution. It is binding upon the institutions, bodies and agencies of the Union in its entirety. It is binding upon the member states and political authorities within them when and in so far as they implement Union law and policy."
Proposer: J. Chabert Status: Opinion of the Committee of the Regions Title: Towards a constitution for European citizens CONV 359/02	Charter should be made binding and "serve as an integral part of a broader European constitutional structure, in order to ensure that the rights set out therein are inalienable…" Applies to human and civil rights, whereas economic and social rights should remain policy objectives at EU level
Proposer: Neil MacCormick Status: personal proposal Title: Democracy at many levels: European Constitutional Reform CONV 298/02	"The Charter of Rights will be a corner-stone in a European Constitution" Specific mode of incorporation is not listed

Proposer: Jens-Peter Bonde Status: personal proposal The Convention about the FutureS of Europe CONV 277/02	The EU should accede to the Human Rights Convention. If the Charter is made binding clear limitations should be set down. Further, "(i)f the Charter is included, it should be explicitly stated that no rights deriving from national constitutions or the European Human Rights Convention should be limited by the decisions of the EU court in Luxembourg."
Proposer: European Peoples Party (EPP) Status: party proposal Title: A Constitution for a Strong Europe	"The Charter of Fundamental Rights has to become an integral part of the European Constitution." The EU should also acceded to the European Convention of Human Rights
Proposer: Party of European Socialists Status: party proposal Title: A successful Convention on the Future of Europe: Our essentials	The Charter should be integrated into the future Treaty and have its binding legal character guaranteed
Proposer: The Altieri Spinelli Institute for Federalist Studies Status: Institute proposal Title: Towards a European Federal Constitution	The Charter is included in the Federal Constitution. "Peace is the value upon which the identity of the European citizen is founded. The assertion in the Constitution of everlasting peace among the European states is the starting-point for extending this principle to the world level."

Several important conclusions emanate from this brief survey. First, no proposal explicitly rejects incorporation of the Charter. Second, the proposals differ somewhat in *how* the Charter is to be incorporated. The proposals echo the positions that were assessed in the Charter Working Group. Third, it is notable that none of the proposals with an institutional sponsor rejects incorporation, albeit the proposal from the UK group of scholars is less supportive than the other ones.

C) Constitutional Proposals – Constitutional Patriotism vs. Deep Diversity

In the following I have selected two very different constitutional proposals that have been presented to the Convention in the latter part of 2002 for further in-depth scrutiny. The point is to examine whether the proposers think of the larger institutional and constitutional setting of the EU as foremost a site of the fostering of constitutional patriotism or of deep diversity. The first proposal is seen as one of the best examples of constitutional patriotism thinking in the Convention, and is labelled a proposal for a European Constitution, whereas the second proposal is probably the coherent proposal

that comes the closest to deep diversity, and is labelled a Constitutional Treaty.[30]

a) The Draft Constitution of the European Union – a Proposal Based on the European Parliament Resolutions

This draft constitution was presented as a contribution from Ms Elena Ornella Paciotti, member of the Charter Convention and alternate member of the Convention on the Future of Europe.[31] The reason for including and assessing this draft is that it is representative of a large group of European Parliamentarians who emphasise the need for the EU to be based on direct democratic legitimacy. The draft is a "practical technical exercise to translate proposals which the European Parliament has already adopted by a very large majority." The draft takes as its starting point the consolidated text of the Treaties (including Nice). It is limited in the sense that it is based only on those proposals that have been set forth in agreed-upon (majoritarian) EP resolutions.

The proposal is clearly written in the spirit of constitutional patriotism, as is clear from the preamble, from the inclusion of the complete Charter of Fundamental Rights, from the statement of the fundamental principles and objectives of the Union (cf. Articles 55–57), from more specific provisions on division of competences and institutional arrangements, and from the rules on amendment. It echoes the same fundamental universal values as the Treaties and the Charter preamble. The core principles ascribed to are those we associate with the democratic constitutional state and the relevant mode of attachment appealed to is that of constitutional patriotism. In the preamble it is also noted that there is a need to overcome Europe's historical divisions through creating a solid construction, "with the prospect of federal-style development".[32] It is interesting to note how strongly the EP situates these principles within a cosmopolitan framework (Article 55(2)). One source of constitutional patriotism is precisely such a cosmopolitan rights-based framework or foundation. Another is the situating of the principles in an institutional structure that permits citizens to see themselves as the ultimate authors of the law. A further is a more contextually based set of values that help to further entrench an attachment to a particular entity. How far does this constitutional proposal go in propounding such, from the text and structure of the proposal itself? In the following, the proposal will be assessed in relation to the criteria of constitutional patriotism, outlined above.

---

[30] I have chosen this over that of Bonde's, as this is a coherent proposal, whereas Bonde's is a discussion note.

[31] Contribution by Ms. Elena Ornella Paciotti, member of the Convention: "A draft constitution for the European Union", CONV 335/02, new version, 19/11/2002.

[32] *Ibid*., at p. 5.

With regard to constitutional patriotism, the first criterion identified above speaks to a firm commitment to personal autonomy. The constitutional proposal sees the EU as explicitly founded on the notion of popular sovereignty, where all powers of the Union emanate from its citizens (Article 55(1)). This is a breach with the present system, which is based on the EU's powers and competences being conferred upon it by the Member States.

It incorporates the entire Charter as part of the constitution, including the preamble. On the one hand this is a clear signal to a strong commitment to a rights-based mode of legitimation, a core component of constitutional patriotism. On the other hand, in terms of ensuring personal autonomy, the constitutional proposal appears imbued with the same weaknesses as those associated with the Charter (as pointed out above), in particular in terms of the weak role and status of political rights within the EU. For one, citizenship of the EU is still mainly derived from and based on citizenship in a Member State.[33] Persons who are long-term residents of another Member State are still barred from voting in the national elections where they reside. Further, third-country nationals cannot obtain citizenship in the EU, without first obtaining citizenship in a Member State, and the rules of naturalisation vary considerably. Their application may be different in that the division of powers gives more scope to the EU than does the present situation. This will be assessed in more detail below. The division of powers cannot rectify the problem pertaining to citizens being subject to laws they do not have an ability to alter or affect, however.

The complete inclusion of the Charter in the constitutional proposal indicates a commitment to social values and social solidarity, as the Charter holds numerous provisions on social rights and expresses a commitment to social solidarity. However, as noted above, such a commitment to social values in the Charter is inadequate unless the Union also has powers and competences within the social field. Social and employment policy are not among the areas defined as the Union's own competences (as spelled out in Article 63), but are listed under Article 64 which speaks to those competences that are shared among the Union and the Member States. A strong commitment to social values would seem to presuppose either (a) an explicit fiscal base or source of funds, or (b) a specification of minimum standards and a commitment to uphold such. Article 64 speaks to (b) and notes that "the Union shall lay down the guidelines, general principles and objectives, including, where necessary, common rules and minimum standards (…)" pertaining both to taxation and to social and employment policy. Article 63 speaks to (a) insofar as it specifies that the funding of the Union's budget is within its own area of competence. It is also interesting to

[33] The proposal copies the horizontal provisions of the Charter and spells out to which articles of the Charter they apply – they do apply to all those pertaining to citizenship. Hence, the criteria for membership are determined in the treaties, not in the constitution.

note that with regard to the rules of application of the principles of subsidiarity and proportionality, in those areas not exclusively within Union competence, one of the three criteria is that "the proposed action meets a requirement for solidarity or cohesion which, in the light of disparities in development, cannot be met satisfactorily by the Member States acting alone". Article 107, on financial equalisation, further reinforces this commitment.[34] How strong this will be in redistributive terms depends, among many factors, on the Union's funding, and the extent to which it also succeeds in reaching down to the level of groups and individuals. This proposal does seek to embed a general commitment to constitutional patriotism within a constitutional structure with a strong onus on social values.

Constitutional patriotism is also premised on accommodation of and not eradication of cultural and other forms of difference. The proposal contains numerous statements on the need to respect the diversity of the peoples of Europe, in terms of their history, culture, language and institutional and political structures (cf. Preamble). These are repeated in the Charter provisions and in the nature of the division of competences. Consistent with the tenor of constitutional patriotism, the proposal is more focused on forging a sense of unity and comity than of promoting difference and diversity, as such.

To foster constitutional patriotism, the Constitution also needs a set of institutional prescriptions that ensure that citizens can see themselves as the ultimate authors of the law. This has implications for the patterns of representation and accountability and the (horizontal and vertical) division of powers. The division of powers also speaks to the reach of the Charter, as the Charter only applies to the EU level. The proposal departs from the principle of conferred powers. Core principles are proportionality, subsidiarity and transparency (Article 55(2)). Article 61 (2) states that "In areas which fall within the exclusive competence of the Union it alone shall have the authority to adopt legislative rules. The Member States may take action in these areas only if authorised by the Union and within the limits of such authorisation, in accordance with the rules laid down by the Treaty". Article 55 (4) states that "In accordance with the Constitution, the law of the Union takes precedence over the law of the Member States".[35] These provisions serve to underline the notion of supremacy of Union law.

The division of powers and the principles guiding this distribution - as set out in the relevant articles - do not differ much from what we normally associate with a state. The elimination of the pillar structure is an element in this, and a step towards a strengthened institutional commitment to

[34] It states that "A system of financial equalization shall be introduced in order to reduce excessive economic imbalances between the regions. The Treaty shall lay down the procedures for the application of this system." *Ibid*., at p. 37.
[35] *Ibid*., at p. 15.

constitutional patriotism. Article 64 contains a long list of shared competences and these are subject to quite general principles for the more specific allocation of tasks between levels. The three main criteria refer to: "relevant scope of action; synergies in terms of effectiveness and economies of scale; and that the proposed action meets a requirement for solidarity or cohesion which, in the light of disparities in development, cannot be met satisfactorily by the Member States acting alone."[36] How far the latter provision extends is not clear but its wording opens up for the taking of the EU in a far more clear social direction, a clear objective in the proposal.

On inter-institutional relations, the proposal is based on the current institutional structure but where the Parliament is given more say, in terms of initiating policy (in relation to the Commission), more say on foreign and security policy, through the issuing of "a binding opinion on the principal aspects and fundamental choices in the area of the foreign and security policy of the Union and shall be kept regularly informed by the Presidency and the Commission of its development",[37] and where the President-in-Office of the Council will be instructed to report to the EP at various stages of its half year work programme. The Commission is to remain an appointed body, but where the EP elects the president of the Commission from two candidates proposed by the Council (meeting as Heads of State or Government). The president nominates the members of the Commission and their appointment is subject to a vote of approval by a majority of MEPs.[38]

The proposal intends to move the EU closer to a parliamentary system, in that the ability of the elected parliament to hold the Commission accountable is strengthened. Some provisions are also made to strengthen the EP's check on the Council and the proposed reforms of the Council would seem to make it more of a European and less of an intergovernmental body (Article 78). The lines of accountability are made clearer in that co-decision is adopted as the procedure for legislative acts. Since there is no pillar structure this also places the EP on an equal footing with the Council in legislative terms. As such the proposal embodies some of the criteria of representativeness and accountability we associate with constitutional patriotism. However, the fact that the Commission is considered to remain an appointed body and as such does not emanate from the EP, suggests that the citizens' principled deliberations in strong publics[39] (EP and national parliaments) and in the general public sphere are less likely to be directly channelled to the executive, and be set forth in programmes where the

[36] *Ibid.*, Article 62.
[37] *Ibid.*, Article 73(3).
[38] *Ibid.*, Article 82.
[39] For this term applied to the EP see Lars C. Blichner: "The anonymous hand of public reason: interparliamentary discourse and the quest for legitimacy", in Erik O. Eriksen and John E. Fossum: *supra*, fn. 15, pp. 141–163; Erik O. Eriksen and John E. Fossum: "Democracy through strong publics in the EU?", *Journal of Common Market Studies*, 40 (2002), pp. 401–423.

political-ideological content, significance and implications are made clear. The lines of accountability will continue to operate in the shadow of an executive imbued with a strong technocratic mindset.

The third set of criteria pertaining to constitutional patriotism is that it both is, and is fully recognised and acknowledged as, 'higher' law. The proposal consists of two main parts, a Constitution and a Treaty. The wording of the text is such as to clearly privilege the Constitution over that of the treaty. In symbolic terms, the proposal speaks of a *Constitution* and not a Constitutional Treaty. With regard to constitutional amendment, constitutional patriotism presupposes that it is consistent with the principle of popular sovereignty. This entails a commitment to some type of majoritarian formula. No single Member State can have veto power over constitutional change. The suggested procedure in the proposed constitution is fourfold. First is the proposal stage. The ability to formulate a proposal is granted to every Member State, the European Parliament, and the European Commission. The second step – provided the proposal is adopted by the Council (which is obligated first to consult the EP and the Commission) – is to establish a Convention modelled on the present one to assess the proposal. The Convention's proposals will then in a third stage have to be approved by a conference of representatives of Member State governments and convened by the President of the Council. For approval a four-fifth majority is needed. The final stage is ratification, which requires a majority of the Member States and whose population totals two-thirds of the Union's population. This provision represents a strong modification and perhaps even departure from the present intergovernmental and IGC-based procedure. These changes would clearly move the EU in the direction of constitutional patriotism.

Treaty change is regulated by Article 118 and is a slightly modified version of the present IGC-based system of treaty change, the main modification being the introduction of majoritarian rules rather than Member State veto.[40]

In summary, this constitutional proposal is written in the spirit of constitutional patriotism. It does take the existing structure as its point of departure, with the Charter made part of the primary law of the Union. But whilst clearly modifying the existing provisions in a manner compatible with the requirements of constitutional patriotism, this process has not been carried through completely.

[40] For reaching a decision a two-third majority of the Council is required and for ratification a majority of Member States, and where their populations total two-thirds of the EU's population is needed. (CONV 335/02:43).

b) Draft Constitutional Treaty of the European Union

This is the contribution presented by Peter Hain but based on the work of Dashwood et al.[41] This assessment deals with the first part of the draft, i.e. what they term the Constitutional Treaty. The Proclamation's concluding paragraph (5) sums up the constitutional status of the EU as "a constitutional order of a new kind, uniting the peoples of the Member States, while preserving the diversity of political institutions and of cultural and linguistic traditions that enriches European civilisation".[42] The introductory Proclamation and Articles 1 (Nature of the Union), 2 (Basic values of the Union), 3–5 (Objectives and Activities of the Union), 6 (Citizenship of the Union), and 7–8 (Organising Principles of the Constitutional Order), seek to retain the EU as a creature of the Member States. From paragraph 4 of the Proclamation, we find that the Member States are seen to exercise their sovereignties in common, through the EU; that the Member States retain their national identities, subject to certain limits; and that the "Union has only those powers which have been conferred on it by the Member States. All powers which the Member States enjoy by virtue of their sovereignty, and which they have not conferred on the Union, remain theirs exclusively. (…) The powers conferred on the Union are to be exercised in ways that encroach as little as possible on the powers of the Member States".[43]

With regard to the first criterion of deep diversity, the proposal is not premised on the need to formulate an overarching agreement as to *what the European Union is for* in terms similar to those used to assess countries. The proclamation underlines the European achievement in ensuring peaceful co-operation among age-old rivals, and emphasises the need to continue to ensure peace, respect for basic principles of democracy, social progress and prosperity, security, as well as "the well-being of humankind." These values are to be propounded by an entity whose defining features are its *uniqueness* in constitutional terms, *its derivative status* – as an entity derived from the Member States, and *its diversity* – in national, institutional and cultural terms. From this can be adduced an instrumental conception of the institutions of the EU, in the sense that their purpose is to ensure that the continued co-operation takes place, and not to foster a deeper sense of allegiance and attachment to the citizens of the EU. Such an allegiance is to be reserved for the Member States. The proposal does clearly not envisage the presence or prospect of a European *demos,* and the institutions of the Union are not intended, nor presumably assumed to have the power or ability, to seriously

[41] European Convention: "Constitutional Treaty of the European Union", *supra* CONV 345/1/02 REV1, 16/10/2002. See also Alan Dashwood, Michael Dougan, Christophe Hillion, Angus Johnston and Eleanor Spaventa, "Draft Constitutional Treaty of the European Union and related documents", *European Law Review,* 28 (2003), forthcoming.
[42] *Ibid*., at p. 9.
[43] *Ibid*., at p. 8.

promote such. The Member States, as portrayed in this proposal, do not appear to be, in a formal-institutional sense, barred from instilling such attitudes, insofar as these sentiments are not directed against other Member States. How this is to be assured requires a closer look at the nature and depth of diversity and how the entity is seen as being held together. The proposal seeks to retain parts of the pillar structure, so that foreign, security and defence policy *remain differentiated* within the second pillar and remain the preserve of the Member States.

The second criterion to assess deep diversity pertains to the overarching society acknowledging the existence of different collective goals, and accommodating these through accepting differentiated citizenship, and allowing for collectives to maintain their sense of difference. The third is that the EU does not curtail the ability of actors to protect their difference.

In its present form, the proposal does not include the text of the Charter, although the Charter is referred to in Article 2, as *one of the sources of fundamental rights*. In other words, the proposal does not endorse the full incorporation of the Charter into the Constitutional Treaty. The Commentary notes that this article is based on Articles 6(1) and (2) TEU (with the added reference to the Charter). The Commentary makes clear that the status of the Charter is not determined and leaves several options, from "a non-binding point of reference for its institutions" to a legally enforceable Bill of Rights. It does go on to say that: "It would certainly seem unsatisfactory for the Union to have promulgated a Charter of Fundamental Rights, which is then excluded altogether from the Constitutional Treaty's list of notional sources of inspiration for the protection of human rights."[44] The Charter will clearly figure as a source of legal rights but the proposal does not adopt it. However, it is interesting to note that having it as only one among the sources could actually leave the Court of Justice with further discretionary powers, as the Court would have several sources from which to pick and choose the basis of its legal interpretations. This is clearly contradictory to the British official rationale for not fully supporting the Charter, namely the problem of entrusting protection of fundamental rights to Courts. The present system does leave the Court with considerable (excessive) leverage. Lenaerts and de Smijter, however, argue that the Charter will reduce this. They note: "the Charter contains a sample – albeit a most impressive one – of the total range of fundamental rights whose respect is guaranteed by the Court of Justice. In that sense the scope of application *ratione materiae* of the Charter is more limited than the protection offered by the present system of guaranteeing respect of fundamental rights in the EU flowing from Article 6(2) *juncto* Article 46(d) EU".[45] The proposal's retention of the relevant articles in the

[44] *Ibid*., at p. 14.
[45] Koen Lenearts and Eddie E. De Smijter: "A 'Bill of Rights' for the European Union", *Common Market Law Review*, 38 (2001), pp. 273–300, at p. 281.

Treaties therefore does not restrict – but enlarges – the scope for the Court of Justice to pursue further rights development and innovation.

On the question of citizenship, the text essentially reproduces the provisions in the existing treaties on access and voting rights. As such, it explicitly states that: "Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship."[46] The other provisions under citizens' rights listed in the Charter are moved to the Act. The provision on the right to move and reside freely in the Union is kept (as Article 6(4)). The resultant provisions on citizenship are clearly conducive to not only differentiated citizenship but a notion of citizenship that is solidly anchored in the Member States, as its core institutional mainstay.

With regard to the scope for collectives to maintain their sense of difference, the EU is supposed to ensure the protection of the sovereignties of the Member States, and to ensure that they retain their national identities – subject to some constraints. This is further ensured through retention of the principle of conferred powers (cf. Article 7), and through what appears as the elevation of this principle to the key constitutional principle in the relation between the EU and the Member States. This assertion is given credence in light of the following provision of Article 7: "The conferment of powers on the Union shall not in itself restrict the powers of the Member States in respect of the same subject-matter, except in the areas identified in Article 9 of this Treaty as falling within the exclusive competence of the Union."[47] This assertion is given further weight when examining the manner in which the principles of subsidiarity and proportionality are considered, again in terms of serving as safeguards for the Member States (cf. Article 7 (3), and (4), respectively). These three core principles guiding the division of powers and competences are thus set up in a mutually reinforcing manner so as to support the Member States. The only exclusive competences allocated to the Union are: (a) common commercial policy; (b) fisheries conservation; and (c) monetary policy for the Member States, which adapt the euro as their currency. In the latter case this exclusive competence is subject to Member State acceptance of monetary union and adoption of the euro, in the first place. The fourth and only 'countervailing' principle is the 'principle of loyal cooperation', which "requires that the Member States support the actions and policies of the Union actively and unreservedly in a spirit of loyalty and mutual solidarity, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Union". According to the included commentaries, this applies to the entire remit of the Union, not only exclusive competences, but also overlapping and shared,

[46] *Ibid*., at p. 21.
[47] *Ibid*., pp. 22–23.

competencies. It does not appear reasonable to assume that it applies to those areas where the Member States have exclusive competence.

The areas deemed to belong to complementary competences include culture, public health, education, vocational training and youth, but here the scope for Union action is defined narrowly: "action by the Union shall be limited to supporting, encouraging, and coordinating action taken by the Member States" (Article 10).

Article 11 spells out a residual category, that of shared competences, which are those "competences of the Union which are neither exclusive nor complementary (…)". These must be spelled out in the acts, in consistency with the principle of conferred powers. Further, as the commentary section notes, "In areas of shared competence, unless and until the Union has adopted a measure, the Member States retain their freedom of action, subject to the horizontal obligations enshrined in the Constitutional Treaty and the annexed Acts. So, for example, national measures intended to protect the environment must respect the rules on free movement of goods".[48]

The assessment of the proposal in relation to the second and third criteria of deep diversity reveals that its notion of Union citizenship is very thin and consistent with deep diversity. Member States have much scope to pursue national projects, in that the exclusive competences of the Union are cast thinly, so as to leave most of the powers and prerogatives with the Member States. As such, the stipulated division of powers and competences is entirely consistent with the Proclamation and the concomitant provisions on the nature of the entity and its basic principles. The Union's remit, in terms of exclusive competences, is almost exclusively economic. There are also explicit limitations on Member State interference with these provisions, as spelled out in Article 9.[49] The very strong economic thrust of the Union and the strong provisions for the protection and promotion of this particular set of functions at Union level might reduce the scope of action for the Member States to actually protect and promote their diverse traditions, their specific languages and their unique institutions. The question then is whether the proposed constitutional treaty provides enough safeguards – not against Union incursions, as such – but against the strong homogenising thrust of the market. For instance, in the Commentary section on Article 10 (Complementary competences) it is noted that horizontal principles such as non-discrimination and free movement bind the Member States. Insofar as these horizontal principles operate according to an economic, market-based logic, they could have such a homogenizing thrust. Such a thrust is clearly *not consistent* with the spirit of deep diversity.

The fourth criterion to assess deep diversity refers to provisions on constitutional amendment. For these to be in the spirit of deep diversity they

[48] *Ibid*., at p. 31.
[49] *Ibid*., at p. 27, see also Commentary, p. 27–28.

must contain provisions to protect national veto rights. Article 25 of the proposal essentially copies the present Article 48 TEU, which sets out an intergovernmental and executive-based approach to treaty change and is based on national veto. It is also noteworthy that the European Parliament (and all national parliaments must go through the governments or the Commission) has no ability to initiate a proposal for change. The amendment procedures for the Constitutional Treaty are thus consistent with what might be expected from deep diversity.

The fifth criterion of deep diversity is that those groups or collectives that feel different or distinct will have access to measures that serve to maintain their sense of difference or distinctiveness over time. In other words, there have to be channels of access and other institutional arrangements that privilege collective and group-based actors that pursue their distinct identities. This also speaks to what type of entity the EU is, fundamentally – market or polity – and further how overall conducive to identity politics it is. In this sense it is important to consider what effects the strong market logic that this proposal propounds will have on the role and prospects for an EU based on deep diversity.

The proposal provides one important such recourse, Article 27, which sets out the procedures on withdrawal from the Union. In the Commentary it is noted that: "The wording of the proposed Article 27(1) makes it explicit that a Member State does not need 'permission' to withdraw from the Union."[50] This of course is an important safety valve but if the threshold is low for withdrawal, it might end up lowering the actual diversity of the EU, as those states that see their uniqueness threatened, leave the Union.

It is also interesting to explore how comprehensive – in terms of forms of difference and diversity – the proposal is. Does it speak to regions or social movements or does it simply privilege Member States? Are other forms and types of identities in any sense privileged? In the proclamation this is fairly widely cast, is this also reflected in the relevant provisions of the draft? The overall impression is that the proposal is foremost concerned with Member States. There are no special provisions for social movements to gain access.

This proposal is written in the spirit of the EU as an entity derived from the Member States and *not* in the spirit of a European constitutional patriotism. However, the commitment to deep diversity, as both Taylor and Weiler see this, is not as apparent as might be assumed from the strong onus on the Member States, as the proposal envisions the EU as a largely economic type of entity with a set of institutions to entrench these. There is scope for market correcting measures but these are not given the same strong standing as the market protecting ones in the proposal.

---

[50] *Ibid*., at p. 49.

Conclusion

The purpose of this chapter was to assess the type of allegiance that the Charter was based on. The EU is a unique type of entity that requires conceptual and normative categories that can capture its particular features, whilst also simultaneously spell out a set of normative standards that are reflective of the achievements of modern democracies. The two relevant standards of assessment used here are a rights-based constitutional patriotism and a culture-based deep diversity. These two standards provide very different intakes to the role and status of the Charter, and to the nature and status of constitution itself.

The assessment found that the spirit of the Charter was that of constitutional patriotism but that this was not carried through in the provisions of the Charter, in particular with regard to the provisions for public autonomy. The *democratic* impetus of the Charter was thus found to be wanting, in relation to the standards of constitutional patriotism. To fully grasp the salience of the Charter as a vehicle to propound constitutional patriotism, it must also be assessed in relation to the institutional and constitutional setting in which it is to be placed. The Charter in its present form is a political declaration, formally speaking, and not a legally binding document. It is also steeped in the complex institutional setting of the EU, an entity with clear institutional defects, in a democratic sense. This institutional setting is forged amidst conflicting conceptions of the EU and reflects and to a large extent also protects the great amount of diversity in Europe.

But there are important developments that promise to relegate these assessments to the dustbin of history, at a pace that is truly breathtaking. Since constitutional patriotism presupposes a legally binding Charter that is also a part of the constitution, the role and status of the Charter in the Convention provides us with a critical test of constitutional patriotism. It was shown that the Constitutional Convention has embraced the Charter. This applies to the recommendations from the Working Group on the Charter, from a clear majority of the members of the Convention, and from basically all the constitutional proposals. The Convention has also proposed institutional changes – abolition of the pillar structure – that promise to give the Charter a more clear legal and constitutional status. The Convention's deliberations, thus, take place within an atmosphere more marked by constitutional patriotism than by deep diversity. But the Convention appears bent on accepting the Charter as is, and will therefore not rectify the limitations built into it, in relation to the requirements of constitutional patriotism. It remains to be seen how much further in this direction the Convention will move and whether these developments will be endorsed by the IGC-2004. The examination of the two proposals revealed that both took

the present EU as their point of departure and both were to different degrees encumbered by it.

The Laeken Declaration noted that the EU is at a crossroads. This is clearly a correct assessment. The analysis presented here reveals that there is a clear sense of which direction to take, but whether this road will be travelled or whether the EU will veer off, remains to be seen. This is not a trite matter. There is much at stake.

Chapter 12

Why Europe Needs a Constitution

Jürgen Habermas

There is a remarkable contrast between the expectations and demands of those who pushed for European unification immediately after World War II, and those who contemplate the continuation of this project today – at the very least, a striking difference in rhetoric and ostensible aim. While the first generation advocates of European integration did not hesitate to speak of the project they had in mind as a 'United States of Europe', evoking the example of the USA, current discussion has moved away from the model of a federal state, avoiding even the term 'federation'.[1] Larry Siedentop's recent book *Democracy in Europe* expresses a more cautious mood: as he puts it, "a great constitutional debate need not involve a prior commitment to federalism as the most desirable outcome in Europe. It may reveal that Europe is in the process of inventing a new political form, something more than a confederation but less than a federation – an association of sovereign states which pool their sovereignty only in very restricted areas to varying degrees, an association which does not seek to have the coercive power to act directly on individuals in the fashion of nation states".[2] Does this shift in climate reflect a sound realism, born of a learning-process of over four decades, or is it rather the sign of a mood of hesitancy, if not outright defeatism?

Siedentop misses the mark when he complains of the lack of any profound or inspired *constitutional* debate on the fate of Europe, capable of seizing the imagination of its peoples. For our situation today is not comparable to that of either the Federalists or the delegates to the Assemblée Nationale. At the end of the eighteenth century, in Philadelphia and Paris, the Founding Fathers and the French Revolutionaries were engaged in an extraordinary undertaking, without historical precedent. More than two hundred years later, we are not merely heirs to a long established practice of constitution-making; in a sense, the constitutional question does not provide the key to the main problem we have to solve. For the challenge before us is not to *invent* anything but to *conserve* the great democratic achievements of the European nation-state, beyond its own limits. These achievements include not only formal guarantees of civil rights, but levels of social welfare, education and leisure that are the precondition of both an effective private autonomy and of democratic citizenship. The contemporary 'substantification' of law means that constitutional debates over the future of

1 Frank Niess: "Das 'F-Wort'", *Blätter für deutsche und internationale Politik*, September 2000, pp. 1105–1115.
2 Larry Siedentop: *Democracy in Europe* (London: Allen Lane 2000), p. 1.

Europe are now increasingly the province of highly specialized discourses among economists, sociologists and political scientists, rather than the domain of constitutional lawyers and political philosophers. On the other hand, we should not underestimate the symbolic weight of the sheer fact that a constitutional debate is now publicly under way. As a political collectivity, Europe cannot take hold in the consciousness of its citizens simply in the shape of a common currency. The intergovernmental arrangement at Maastricht lacks that power of symbolic crystallization which only a political act of foundation can give.

I. An Ever-closer Union?

Let us then start from the question: why should we pursue the project of an 'ever-closer Union' any further at all? Recent calls from Rau, Schroeder and Fischer – the German President, Chancellor and Foreign Minister – to move ahead with a European Constitution have met sceptical reactions in Great Britain, France and most of the other member-states. But even if we were to accept this as an urgent and desirable project, a second and more troubling question arises. Would the European Union in its present state meet the most fundamental preconditions for acquiring the constitutional shape of any kind of federation – that is, a community of nation-states that itself assumes some qualities of a state?

Why should we pursue the project of a constitution for Europe? Let me address this question from two angles: (i) immediate political goals, and (ii) dilemmas stemming from virtually irreversible decisions of the past. If we consider the first, it is clear that while the original political aims of European integration have lost much of their relevance, they have since been replaced by an even more ambitious political agenda. The first generation of dedicated Euro-federalists set the process in train after World War II with two immediate purposes in mind: to put an end to the bloody history of warfare between European nations, and to contain the potentially threatening power of a recovering post-fascist Germany. Though everybody believes that the first goal has already been achieved, the relevance of peace-keeping issues survives in a different context. In the course of the Kosovo war, its participants became aware of subtle yet important differences in the way that the US and UK, on the one hand, and the continental nations of Europe on the other, justified this humanitarian intervention – the former resorting to maxims of traditional power politics, the latter appealing to more principled reasons for transforming classical international law into some sort of cosmopolitan order. This is a difference that exemplifies the rationale for developing a European Union capable of speaking with one voice in matters of foreign and security policy, and bringing a stronger influence of its own to bear on NATO operations and UN decisions. Recent attempts by Persson,

Solana and Patten to mediate between North and South Korea offer the first sign of a more serious intention by the EU to engage in global affairs.

The second goal, the containment of a potentially dangerous Germany, may have lost its salience with the growing stability of democratic institutions and spread of liberal outlooks in the Federal Republic, even if the unification of the country has revived fears of some return to the self-assertive traditions of the German Reich. I need not pursue this question here, since neither of the two original motives for integration could be regarded as a sufficient justification for pushing the European project any further. The 'Carolingian' background of the founding fathers – Schuman, De Gasperi, Adenauer – with its explicit appeal to the Christian West, has vanished.

Of course, there was always a third strand in European integration – the straightforward economic argument that a unified Europe was the surest path to growth and welfare. Since the Coal and Steel Community of 1951, and the subsequent formation of Euratom and the European Economic Community of 1958, more and more countries have become gradually integrated through the free exchange of people, goods, services and capital between them – a process now completed by the single market and single currency. The European Union frames an ever denser network of trade-relations, 'foreign' direct investment, financial transactions and so forth. Alongside the US and Japan, Europe has gained a rather strong position within the so-called Triad. Thus the rational expectation of mutual benefits within Europe and of differential competitive advantages on world markets could, to date, provide a legitimation 'through outcomes' for an ever-closer Union. But even making allowances for the consciousness-raising impact of the Euro, which will soon become a unifying symbol in everyday life across the Continent, it seems clear that henceforward economic achievements can at best stabilize the status quo. Economic expectations alone can hardly mobilize political support for the much riskier and more far-reaching project of a *political union* – one that deserved the name.

II. Beyond a 'Mere Market'

This further goal requires the legitimation of shared values.[3] There is always a trade-off between the efficiency and legitimacy of an administration. But great political innovations, such as an unprecedented design for a state of nation-states, demand political mobilization for normative goals. Constitution-making has hitherto been a response to situations of crisis. Where is such a challenge, we might ask, in today's rather wealthy and

[3] John E. Fossum: "Constitution-making in the European Union", in Erik O. Eriksen and John E. Fossum (eds.): *Democracy in the European Union – Integration through Deliberation?* (London: Routledge 2000), pp. 111–163.

peaceful societies of Western Europe? In Central and Eastern Europe, by contrast, transitional societies striving for inclusion and recognition within the Union do face a peculiar crisis of rapid modernization – but their response to it has been a pronounced return to the nation-state, without much enthusiasm for a transfer of parts of their recently regained national sovereignty to Brussels. The current lack of motivation for political union, in either zone, makes the insufficiency of bare economic calculations all the more obvious. Economic justifications must at the very least be combined with ideas of a different kind – let us say, an interest in and affective attachment to a particular ethos: in other words, the attraction of a specific way of life. During the third quarter of the past century, Eric Hobsbawm's 'Golden Age', the citizens of Western Europe were fortunate enough to develop a distinctive form of life based on, but not exhausted by, a glistening material infrastructure. Today, against perceived threats from globalization, they are prepared to defend the core of a welfare state that is the backbone of a society still oriented towards social, political and cultural inclusion. This is the orientation that is capable of embedding economic arguments for an ever-closer union into a much broader vision. Of course, rapid economic growth was the basis for a welfare state that provided the framework for the regeneration of postwar European societies. But the most important outcome of this regeneration has been the production of ways of life that have allowed the wealth and national diversity of a multi-secular culture to become attractively renewed.

The economic advantages of European unification are valid as arguments for further construction of the EU only if they can appeal to a cultural power of attraction extending far beyond material gains alone. Threats to this form of life, and the desire to preserve it, are spurs to a vision of Europe capable of responding inventively to current challenges. In his magnificent speech of May 28, the French Prime Minister spoke of this 'European way of life' as the content of a political project: "Till recently the efforts of the Union were concentrated on the creation of monetary and economic union (…) But today we need a broader perspective if Europe is not to decay into a mere market, sodden by globalization. For Europe is much more than a market. It stands for a model of society that has grown historically (…)".[4]

III. Globalization and Social Solidarity

Economic globalization, whether we interpret it as no more than an intensification of long-range trends or as an abrupt shift towards a new transnational configuration of capitalism, shares with all processes of

[4] Speech to the Foreign Press Association, Paris, 28 May 2001.

accelerated modernization some disquieting features. Rapid structural change distributes social costs more unequally, and increases status gaps between winners and losers, generally inflicting heavier burdens in the short run, and greater benefits only in the long term.[5] The last wave of economic globalization did not stem from any inherent evolution of the system: it was the product in large measure of successive GATT rounds – that is, of conscious political action. Democratic governments should therefore also have the chance, at least in principle, to counter the undesired social consequences of globalization by complementary social and infrastructural policies. Such policies have to cope with the needs of two different groups.

Their purpose must be to bridge the time-gap for short-run losers by investments in human capital and temporal transfers, and to offer permanent compensation to long-run losers in – for example – the form of a basic income scheme or negative income tax. Since neither group is any longer in a strong veto position, the implementation of such designs is a difficult task. For the decision on whether or not to maintain an appropriate level of *general* social welfare largely depends on the degree of support for notions of distributive justice. But normative orientations move majorities of voters only to the extent that they can make a straightforward appeal to 'strong' traditions inscribed in established political cultures. In Western Europe, or at any rate its continental nations, this assumption is not quite unfounded. Here the political tradition of the workers' movement, the salience of Christian social doctrines and even a certain normative core of social liberalism still provide a formative background for social solidarity. In their public self-representations, Social and Christian Democratic parties in particular support inclusive systems of social security and a substantive conception of citizenship, which stresses what John Rawls calls 'the fair value' of equally distributed rights. In terms of a comparative cultural analysis, we might speak of the unique European combination of public collectivisms and private individualism. As Göran Therborn remarks: "the European road to and through modernity has also left a certain legacy of social norms, reflecting European experiences of class and gender (…) Collective bargaining, trade unions, public social services, the rights of women and children are all held more legitimate in Europe than in the rest of the contemporary world. They are expressed in social documents of the EU and of the Council of Europe".[6]

But if we grant this assumption, there remains the question of why national governments should not be in a better position to pursue countervailing policies more effectively than a heavy-handed EU bureaucracy. At issue here is the extent to which intensified global competition affects the scope of action of national governments. In a recent

---

[5] Georg Vobruba: "Actors in Processes of Inclusion and Exclusion", *Social Policy and Administration*, 32 (2000), pp. 603–613.

[6] Göran Therborn: "Europe's Break with Itself", in Franco Cerutti and Enno Rudolph (eds.): *A Soul for Europe*, vol. 2 (Peeters: Leuven 2000), pp. 73-94, at p. 85.

book I argued that there has been a shift towards a 'post-national' constellation.[7] Some counter-considerations have been adduced since then.[8] No linear relation exists, it is observed, between economic globalization and the decreasing autonomy of the national state; nor is there always an inverse relation between levels of social welfare and employment. Independently of growing global pressures from without, the state has anyway had to learn to play a less dominant role *within national arenas*, in its interactions with powerful social agents.[9] National governments may be compelled to lower taxes on capital under the pressure of international competition, but they still seem to enjoy a range of options in policy areas that have an immediate impact on interdependent rates of unemployment and levels of social welfare.[10]

IV. Normative Appeals

Such arguments do not undermine, however, the general thesis that national governments, whatever their internal profiles, are increasingly entangled in transnational networks, and thereby become ever more dependent on *asymmetrically negotiated* outcomes. Whatever social policies they choose, they must adapt to constraints imposed by deregulated markets – in particular global financial markets. That means lower taxes and fiscal limits which compel them to accept increasing inequalities in the distribution of the gross national product.[11] The question therefore is: can any of our small or medium, *entangled and accommodating* nationstates preserve a separate capacity to escape enforced assimilation to the social model now imposed by the predominant global economic regime? This model is informed by an anthropological image of 'man' as rational chooser and entrepreneur, exploiting his or her own labour-power; by a moral view of society that accepts growing cleavages and exclusions; and by a political doctrine that trades a shrinking scope of democracy for freedoms of the market. These are the building blocks of a neo-liberal vision that does not sit well with the kind of normative self-understanding so far prevalent across Europe as a whole.

This diagnosis suggests a normatively loaded, perhaps a 'socialdemocratic', reading of the economic justification for the European project. It might be objected that any such partisan view must divide the

---

[7] Jürgen Habermas: *The Postnational Constellation* (Cambridge, MA: MIT Press 2000).

[8] Edgar Grande and Thomas Risse: "Bridging the Gap", *Zeitschrift für internationale Beziehungen*, 7 (2000), pp. 235–266.

[9] Josef Esser: "Der kooperative Nationalstaat im Zeitalter der 'Globalisierung'", in Diether Döring (ed.): *Sozialstaat in der Globalisierung* (Frankfurt: Suhrkamp 1999), pp. 117–144.

[10] Fritz Scharpf: "The Viability of Advanced Welfare States in the International Economy", *Journal of European Public Policy*, 7 (2000), pp. 190–228.

[11] For Germany, see Richard Hauser and Irene Becker: "Wird unsere Einkommensverteilung immer ungleicher? Einige Forschungsergebnisse", in Döring, *supra*, fn. 9, pp. 40–87.

political spectrum along ideological lines. But in the absence of a stronger motivation, this may be necessary to mobilize public debate. As a strategy, it is innocent insofar as its success would at best be a procedural outcome – the creation of a more encompassing political framework. A European constitution would enhance the capacity of the member states of the Union to act jointly, without prejudicing the particular course and content of what policies it might adopt. It would constitute a necessary, not a sufficient condition for the kind of policies some of us are inclined to advocate. To the extent that European nations seek a certain re-regulation of the global economy, to counterbalance its undesired economic, social and cultural consequences, they have a reason for building a stronger Union with greater international influence. Mario Telò and Paul Magnette express the hope that

> Europe will develop an open regionalism that strikes an innovative balance between protectionism and free trade, social regulation and openness. The European Union is now being challenged to develop a better balance between deregulation and re-regulation than national rules have been able to achieve (…) The Union may be seen as a laboratory in which Europeans are striving to implement the values of justice and solidarity in the context of an increasing global economy.[12]

With a view to the future of a highly stratified world society, we Europeans have a legitimate interest in getting our voice heard in an international concert that is at present dominated by a vision quite different from ours.

This would be a way of giving a normative appeal to the European project for those who take a critical view of the impact of economic globalization on nation-states. But even neo-liberals opposed to political goals of this kind must heed other considerations. For further reasons to move European integration forward lie in the uneasy effects of previous decisions that are now irreversible. There is first the need for a reform of EU institutions imposed by the contradiction between the limited capacity of the European Council to reach agreements among diverging member-states, and the political decision to admit several new and even less homogeneous members. The enlargement of the EU will increase the complexity of interests in need of coordination, which cannot be achieved without further integration or 'deepening' of the Union. The EU has set schedules for enlargement that put it under a self-imposed pressure for reform, but reform remains in a deadlock that the Treaty of Nice has not resolved. To date the problem of enlargement has failed to act as a lever for the solution of the more severe *structural* problems that emerge (i) from an asymmetry between

[12] Mario Telò and Paul Magnette: "Justice and Solidarity", in Furio Cerutti and Enno Rudolph (eds.): *A Soul for Europe*, vol. 1 (Peeters: Leuven 2001), pp 73-89, at p. 85.

a rather dense horizontal integration through markets and the rather loose vertical integration of competing national governments, and (ii) from a corresponding deficit in the democratic legitimation of EU decisions.

V. Positive Coordination

So far national governments have retained most of their competencies for cultural, economic and social policies, while they have transferred their monetary sovereignty to an independent and supposedly unpolitical institution, the European Central Bank. They have thereby renounced an important means of state intervention. As monetary union completes the process of economic integration, the need for harmonization of major public policies increases. National governments, resting as they do on different schemes of taxation, social-policy regimes, neo-corporatist arrangements, remain entrenched in distinct legal and political traditions. They therefore tend to respond differently to the same stimuli, and the interactive effects of their disparate policies can produce mutually counterproductive backlashes. (The uncoordinated reactions of neighbouring governments to protests against the sudden rise in oil prices last year provide a harmless case in point.) National governments still compete with one another in pursuit of the most promising adaptation of their welfare regimes to fiscal constraints imposed by the 'evaluation' of global financial markets. At the same time they face the challenge to agree on minimal social standards – steps in the direction of a 'social union', as envisaged by Delors, to promote a European-wide convergence in levels of provision and benefit.

Yet these discrepancies between an advanced economic and a retarded political integration could be overcome by the construction of higherorder political agencies, capable of 'catching up' with the pressures of deregulated markets. From this perspective, the European project can be seen as a common attempt by the national governments to recover in Brussels something of the capacity for intervention that they have lost at home. This is at any rate the view of Lionel Jospin, who has called for common economic management of the Euro-zone, and in the long run harmonization of corporation taxes within it. Such a move would also meet another well-known problem. The so-called 'democratic deficit' of European authorities, in particular of the Commission, is a source of growing dissatisfaction within the broader population – not only of the smaller states like Ireland or Denmark, or countries that have temporarily rejected entry into the Union like Norway or Switzerland. So far, the Commission has mainly pushed market-enhancement policies that require only 'negative coordination', which means that national governments are expected to refrain from doing things. Beyond this threshold, the present kind of indirect legitimation through national governments is no longer sufficient.

Regulatory policies with a widely perceived *redistributive impact* would require 'positive coordination' on both the output-side – that is, implementation – and the input-side – that is, legitimation – of a quite different kind. At present, legitimacy flows more or less through the channels of democratic institutions and procedures within each nationstate. This level of legitimation is appropriate for inter- governmental negotiations and treaties. But it falls short of what is needed for the kind of supra national and transnational decision-making that has long since developed within the institutional framework of the Union and its huge network of committees. It is estimated that European directives already affect up to 70 per cent of the regulations of national agencies. But they lack any serious exposure to a timely and careful public opinion or will-formation in those national arenas that are today alone accessible to holders of a European passport.

The opacity of decision-making processes at the European level, and the lack of opportunity for any participation in them, cause mutual distrust among citizens. Claus Offe has described the issues that stir fears within, and arouse rivalries between, different nations – concerns over fiscal redistribution, over immigration from and investment-flows to other states, over the social and economic consequences of intensified competition between countries with different levels of productivity, and so forth. Though himself a sceptical observer, Offe suggests 'tate-building' as the solution – a European state-building which does not reproduce the template of the nation-state – and remarks that "the agency that will eventually realize a regime of 'organized civility' governing the entire European space (…) will have to conform to two criteria that all European states have now come to take as the standards of acceptable political rule: legitimacy and efficacy".[13]

VI. Civic Nations

So much for the reasons why we should support and promote the project of a European Constitution in the first place. But does Europe in its present shape meet the conditions necessary for the realization of such a design – that is: for the establishment, not simply of a confederation, but a federation of nation-states? We may address first the familiar objections of the Eurosceptics, and then deal more specifically with some of the prerequisites for a Union that would assume at least some qualities of a state.

Eurosceptics reject a shift in the basis of legitimation of the Union from international treaties to a European constitution with the argument, 'there is as yet no European people'.[14] According to this view, what is

[13] Claus Offe: "Is there, or can there be, a European society?", mimeo, 2000, p. 13.
[14] See Ernst-Wolfgang Böckenförde: *Welchen Weg geht Europa?* (Munich: Siemens-Stiftung 1997).

missing is the very subject of a constituent process, the collective singular of 'a people' capable of defining itself as a democratic nation. I have criticized this 'no-demos' thesis on both conceptual and empirical grounds.[15] A nation of citizens must not be confused with a community of fate shaped by common descent, language and history. This confusion fails to capture the voluntaristic character of a civic nation, the collective identity of which exists neither independent of nor prior to the democratic process from which it springs. Such a civic, as opposed to ethnic, conception of 'the nation' reflects both the actual historical trajectory of the European nation-states and the fact that democratic citizenship establishes an abstract, legally mediated solidarity between strangers.

Historically, national consciousness as the first modern form of social integration was fostered by new forms of communication, the development of which was indeed *facilitated* by the stabilizing contexts of traditional communities. The fact that modern democracy and the nation-state have developed in tandem, however, does not indicate a priority of the latter over the former. It rather reveals a *circular process* in the course of which democracy and the nation-state stabilized each other. Both have jointly produced the striking innovation of a civic solidarity that provides the cement of national societies. National consciousness emerged as much from the mass communication of formally educated readers as from the mobilization of enfranchised voters and drafted soldiers. It has been shaped as much by the intellectual construction of national histories as by the discourse of competing parties, struggling for political power.

There are two lessons to be learnt from the history of the European nation-states. If the emergence of national consciousness involved a painful process of abstraction, leading from local and dynastic identities to national and democratic ones, why, firstly, should this generation of a highly artificial kind of civic solidarity – a 'solidarity among strangers' – be doomed to come to a final halt just at the borders of our classical nation-states? And secondly: the artificial conditions in which national consciousness came into existence recall the empirical circumstances necessary for an extension of that process of identityformation beyond national boundaries. These are: the emergence of a European civil society; the construction of a European-wide public sphere; and the shaping of a political culture that can be shared by all European citizens.

[15] "On the Relation between the Nation, Rule of Law, and Democracy", in Jürgen Habermas: *The Inclusion of the Other* (Cambridge, MA: MIT Press 1998), pp. 129–154.

VII. A Catalytic Constitution

These functional prerequisites of a democratically constituted European Union project points of convergence between rather complex processes. We should not forget, however, that this convergence in turn depends on the catalytic effect of a constitution. This would have to begin with a referendum, arousing a Europe-wide debate – the making of such a constitution representing in itself a unique opportunity of transnational communication, with the potential for a self-fulfilling prophecy. Europe has to apply to itself, as a whole, "the logic of the circular creation of state and society that shaped the modern history of European countries".[16]

A European constitution would not only make manifest the shift in powers that has already taken place. It would also release and foster further shifts. Once the European Union gained financial autonomy, the Commission assumed the functions of a government and the Council became something like a second chamber, the European Parliament would attract more attention for the better-staged and more visible exercise of competencies which are already remarkable. Full budgetary powers would not be necessary in the beginning. The focus of politics would move to some extent from national capitals to the European centres – not just through the activities of lobbyists and business organizations which have quite a strong presence in Brussels already, but through those of political parties, labour unions, civic or cultural associations, public interest groups, social movements and 'pressure from the street' – protests no longer merely by farmers or truck-drivers, but arising from the initiatives of citizens at large. Relevant interests formed along lines of political ideology, economic sector, occupational position, social class, religion, ethnicity and gender would moreover fuse *across national* boundaries.[17] The perceived transnational overlap of parallel interests would give rise to cross-boundary networks and a properly European party system, displacing territorial by functional principles of organization.

VIII. Creating a Public Sphere

There will be no remedy for the legitimation deficit, however, without a European-wide public sphere – a network that gives citizens of all member states an equal opportunity to take part in an encompassing process of focused political communication. Democratic legitimation requires mutual contact between, on the one hand, institutionalized deliberation and decision-

[16] Offe, *supra*, fn. 13, at p. 13.
[17] Philippe Schmitter: "Imagining the Future of the Euro-Polity", in Gary Marks and Fritz Scharpf (eds.): *Governance in the European Union* (London: Sage 1996), pp. 121–150.

making within parliaments, courts and administrative bodies and, on the other, an inclusive process of informal mass communication. The function of the communicational infrastructure of a democratic public sphere is to turn relevant societal problems into topics of concern, and to allow the general public to relate, at the same time, to the same topics, by taking an affirmative or negative stand on news and opinions. Over time, these implicit attitudes coagulate to constitute public opinion, even though most citizens do not send public messages beyond voting or non-voting. So far, however, the necessary infrastructure for a wide-ranging generation of diverse public opinions exists only within the confines of nation-states.

A European-wide public sphere must not be imagined as the projection of a familiar design from the national onto the European level. It will rather emerge from the mutual opening of existing national universes to one another, yielding to an interpenetration of mutually translated national communications. There is no need for a stratified public communication, each layer of which would correspond, one by one, to a different 'floor' of the multilevel political system. The agenda of European institutions will be included in each of a plurality of national publics, if these are inter-related in the right way.

The pressing question "Can the European Union become a sphere of publics?"[18] is often answered from a supranational rather than a trans national perspective. If we look for monolingual (usually Englishspeaking) media with multinational audiences penetrating national borders we find a business elite reading the *Financial Times* and the *Economist,* or a political elite reading the *International Herald Tribune* with a digest of the *Frankfurter Allgemeine Zeitung* – which means: nothing specifically European. This is not a promising model for the audiovisual communications of a general public, even for cross-boundary communication via print media. In the audio-visual sector, the bilingual, French-German television channel *Arte* is already more plausible, though still aimed at a notionally supranational public. A real advance would be for national media to cover the substance of relevant controversies in the other countries, so that all the national public opinions converged on the same range of contributions to the same set of issues, regardless of their origin. This is what happens temporarily – if only for a few days – before and after the summits of the European Council, when the heads of the member states come together and deal with issues of equal perceived relevance for citizens across Europe. The fact that these multiple, horizontal flows of communication have to pass through the filters of translation does not reduce their essential significance.

Within the present Union of fifteen members there are thirteen different, officially recognized languages. This constitutes at first glance an

[18] This is the title of an informative empirical analysis by Philip Schlesinger and Deirdre Kevin, in Eriksen and Fossum, *supra*, fn. 3, pp. 206–229.

embarrassing obstacle to the formation of a shared polity for all. The official multilingualism of EU institutions is necessary for the mutual recognition of the equal worth and integrity of all national cultures. However, under the veil of this legal guarantee it becomes all the easier to use English as a working language at face-to-face level, wherever the parties lack another common idiom.[19] This is in fact what now happens anyway, in ever wider circles. Small countries like the Netherlands, Denmark, Norway or Sweden provide good examples of the capacity of formal education in schools to spread English as a second 'first' language, across their whole populations.[20]

IX. Sharing a Political Culture

The generation of a European public opinion depends on the vital inputs of actors within a European civil society. At the same time, a European-wide public sphere needs to be embedded in a political culture shared by all. This widely perceived requirement has stimulated a troubled discourse among intellectuals, since it has been difficult to separate the question 'What is Europe?' from the fact that the achievements of European culture – which did not, in fact, seriously reflect upon its own nature and origin until the eighteenth or nineteenth centuries – have been diffused across the globe.[21] The main religion in Europe, Christianity, obeyed its missionary imperative and expanded all over the world. The global spread of modern science and technology, of Roman law and the Napoleonic Code, of human rights, democracy and the nation-state started from Europe as well. Let me therefore two more specific experiences of our countries that resonate still in the rather remarkable responses they have evoked. For Europe has, more than any other culture, faced and overcome structural conflicts, sharp confrontations and lasting tensions, in the social as well as in the temporal dimension.

In the social dimension, modern Europe has developed institutional arrangements for the productive resolution of intellectual, social and political conflicts. In the course of painful, if not fatal struggles, it has learnt how to cope with deep cleavages, schisms and rivalries between secular and ecclesiastical powers, city and countryside, faith and knowledge, and how to get along with endemic conflicts between militant religious confessions and belligerent states. In the temporal dimension, modern Europe has institutionalized a comprehensive spectrum of competing conservative,

[19] Peter Kraus: "Von Westfalen nach Kosmopolis. Die Problematiks kultureller Identität in der Europäischen Politik", *Berliner Journal für Soziologie*, vol. 2 (2000), pp. 203–218; Peter Kraus: "Political Unity and Linguistic Diversity in Europe", *Archives Européenes de Sociologie*, 41 (2000), pp. 138–163.

[20] Kraus cites a poll finding that even a majority of the German-speaking Swiss prefer English to the two other national languages for communication across linguistic borders.

[21] Pim den Boer: "Europe as an Idea", *European Review*, October 1998, pp. 395–402.

liberal and socialist interpretations of capitalist modernization, in an ideological system of political parties. In the course of a heroic intellectual appropriation of a rich Jewish and Greek, Roman and Christian heritage, Europe has thus learnt a sensitive attitude and a balanced response, both to the deplorable losses incurred by the disintegration of a traditional past and to the promise of future benefits from the 'creative destruction' of present productivity.

These are dispositions that act as a spur to critical reflection on our own blind spots, and to a de-centering of selective perspectives. They are not in contradiction with the well-taken – and only too deserved – critique of our aggressive colonial and Eurocratic past; the critique of Eurocentrism itself emerges from a continuing self-criticism. The secularization of the egalitarian and individualist universalism that informs our normative self-understanding is not the least among the achievements of modern Europe.

The fact that the death penalty is still practised elsewhere – even in the United States – reminds us of some specific features of our heritage:

> The Council of Europe with the European Convention of Human Rights, and its European Social Charter, have transformed Europe into an area of human rights, more specific and more binding than in any other area of the world (…) The clear and general European support for International Crimes Tribunal, again in contrast to US fears, is also in the same line.[22]

What forms the common core of a European identity is the character of the painful learning process it has gone through, as much as its results. It is the lasting memory of nationalist excess and moral abyss that lends to our present commitments the quality of a peculiar achievement. This historical background should ease the transition to a post-national democracy based on the mutual recognition of the differences between strong and proud national cultures. Neither 'assimilation' nor 'coexistence' – in the sense of a pale *modus vivendi* – are appropriate terms for our history of learning how to construct new and ever more sophisticated forms of a 'solidarity among strangers'. Today, moreover, the European nation-states are being brought together by the challenges which they all face equally. All are in the process of becoming countries of immigration and multicultural societies. All are exposed to an economic and cultural globalization that awakes memories of a shared history of conflict and reconciliation – and of a comparatively low threshold of tolerance towards exclusion.

This new awareness of what Europeans have in common has found an admirable expression in the EU Charter of Basic Rights. The members of

[22] Göran Therborn: "Europe's Break with Itself", in Cerutti and Rudolph, *supra*, fn. 6, at p. 49 ff.

the 'Convention', as it is called, reached agreement on this document within a remarkably short space of time. Even though the European Council in Nice only 'proclaimed' and did not adopt in binding fashion its catalogue of basic rights, the Charter will exert a decisive influence on the European Court of Justice. Thus far the Court has been primarily concerned with the implications of the 'four freedoms' of market participation – free movement of persons, goods, services and capital. The Charter goes beyond this limited view, articulating a social vision of the European project.[23] It also shows what Europeans link together normatively. Reponding to recent developments in biotechnology, Article 3 specifies each person's right to his or her physical and mental integrity, and prohibits any practice of positive eugenics or the reproductive cloning of human organisms.

X. Designing a Framework

Taking it as a premise that a European Constitution is both feasible and desirable, let me finish with a few remarks on some problems to do with its design. Joschka Fischer has outlined the challenge we face – how to find the right combination of a 'Europe of nation-states' with a 'Europe of citizens'.[24] He has also mentioned some more or less conventional alternatives for strengthening the European Parliament, establishing an effective and legitimate executive, and creating a democratically accountable Court of Justice.[25] These proposals do not exhaust the range of imaginative options, but Fischer rightly focuses on the core problem of a federation of nation-states that need to preserve their integrity by occupying a much more influential position than the constituent elements of a federal state normally do.[26] The intergovernmental element of negotiation between former nation-states will remain strong. Compared with the presidential regime of the USA, a European Union of nation-states would have to display the following general features:

[23] Wolfgang Däubler: "In bester Verfassung", *Blätter für deutsche und internationale Politik*, November 2000, pp. 1315–1321.

[24] Joschka Fischer: "Vom Staatenverbund zur Föderation" (speech at Humboldt University on 12 May 2000), Frankfurt 2000.

[25] Fischer offers an option between the models of the US Senate and the German Bundesrat for the second chamber, and a choice between two constructions, one developed from the European Council of Ministers, and the other resembling the present Council, but with a directly elected president, for the executive.

[26] In this respect Article 3 of the new Swiss Constitution is interesting, in that it applies the principle of subsidiarity to yield a rather strong position to the constitutive units: "The cantons are sovereign, so long as their sovereignty suffers no restriction from the federal constitution; they exercise all rights that are not transferred to the confederation."

- a Parliament that would resemble the Congress in *some* respects (a similar division of powers and, compared with the European parliamentary systems, relatively weak political parties);
- a legislative 'chamber of nations' that would have more competencies than the American Senate, and a Commission that would be much less powerful than the White House (thus splitting the classical functions of a strong Presidency between the two);
- a European Court that would be as influential as the Supreme Court for similar reasons (the regulatory complexity of an enlarged and socially diversified Union would require detailed interpretation of a principled constitution, cutting short the jungle of existing treaties).[27]

In this context a few remarks may be in place.

1. The political substance of a European Constitution would consist of a definite answer to the issue of the territorial boundaries of the Union, and a not-too-definite answer to the question of how competences are to be distributed between federal and national institutions. It is important to settle soon the thorny problem of which countries will finally belong to, and which are to be excluded from, the Union; the determination of frontiers is compatible with a 'variable geometry' that would facilitate the process. For the time being, we might differentiate between a centre and a periphery, depending on the pace and degree of integration. The issue of a 'Europe of different speeds' touches on the problem of a provisional regulation of competences which leaves some room for experiments.

   The embattled delimitation of what is to be reserved for executive authorities, what is up for co-legislation and what remains in the competence of national legislatures must certainly be settled in broad outline from the beginning. But this part of the organizational nucleus of the Constitution should be kept open for revisions at fixed dates, so that we can learn from unanticipated consequences within a stable framework. Such a temporalization of essential clauses squares with the idea of a democratic constitution as an ever more exhaustive realization of a system of basic rights under changing historical circumstances.[28]

---

[27] See the study for a reorganization of the treaties: European University Institute, *Reorganisation of the European Treaties*, May 2000, available, with companion texts, at http://www.iue.it/RSCAS/Research/Institutions/EuropeanTreaties.shtml.

[28] See my argument in *Between Facts and Norms* (Cambridge, MA: Polity Press 1996), ch. 9.

2. 'Subsidiarity' is the functional principle that meets the needs of the diverse and territorially distinct units of a federation. But the wider the differences – in size of territory and population, economic weight and level of development, political power and cultural form of life or collective identity – between these constituent units, the greater the danger that majority decisions at the higher instances will violate the principles of equal protection and mutual recognition of diversity. Structural minorities limit the range of valid majority decisions. In such situations, legitimacy can only be secured on the condition that some areas are reserved for consensual negotiations. As we know from countries like Switzerland or the Netherlands, however, consensual procedures suffer from a lack of transparency. Here European-wide referenda would give citizens broader opportunities and more effective means to participate in the shaping of policies.[29]

3. Some minor suggestions are worth consideration. It would help to overcome the legitimation deficit, and to strengthen the connexions between the federal legislature and national arenas, either if certain members of the European Parliament at the same time held seats in their respective national parliaments, or if the largely neglected Conference of European Affairs Committee (which has met twice a year since 1989) could reanimate horizontal debate between national parliaments and so help to prompt a re-parliamentarization of European politics.[30] Are there alternative modes of legitimation too? The approach labelled 'comitology' attributes legitimating merits to the deliberative politics of the great number of committees working in support of the Commission.[31] But here there is a deficit on the output as well as input side, since federal legislation is implemented only through national, regional and local authorities. To meet this problem, Ingo Pernice has suggested transforming the present Committee of Regions into a chamber that would give sub-national state actors a stronger influence on EU policies, and thereby facilitate the enforcement of European law on the ground.[32]

---

[29] Edgar Grande: "Post-National Democracy in Europe", in Michael Greven and Louis Pauly (eds.): *Democracy beyond the State?* (Lanham, Md. : Rowman & Littlefield 2000), pp. 115–138; and "Demokratische Legitimation und europäische Integration", *Leviathan*, 24 (1996), pp. 339–360.

[30] Lars Blichner: "Interparliamentary discourse and the quest for legitimacy", in Eriksen and Fossum, *supra*, fn. 3, pp. 140–163.

[31] Christian Joerges and Michelle Everson: "Challenging the bureaucratic challenge", in Eriksen and Fossum, *supra*, fn 3, pp. 164–188.

[32] "Which institutions for what kind of Europe?", ms. 1999. For another conception, see Dominique Rousseau: "Pour une constitution européenne", *Le Débat*, January–February (2000), pp. 54–73.

XI. The Politics of Unification

For European unification to move forward, however, there still remains a vacant space which would have to be filled by the political will of competent actors. The overwhelming majority of the population that is currently resistant or hesitant can only be won for Europe if the project is extricated from the pallid abstraction of administrative measures technical discourse: in other words, is politicized. Intellectuals have not picked up this ball. Still less have politicians wanted to burn their fingers with such an unpopular topic. The fillip given to a constitutional debate by Fischer's speech at the Humboldt University, prompting Chirac and Prodi, Rau and Schroeder to react with their own suggestions, is all the more noteworthy. But it is Jospin who has pointed out that no reform of procedures and institutions can succeed before the content of the political project behind it becomes clearer.

The markedly national orientation of the Bush Administration can be regarded as an opportunity for the EU to define a more distinctive foreign and security policy towards the conflicts in the Middle East and the Balkans, and relations with Russia and China. Differences that are coming more into the open in environmental, military and juridical fields contribute to a soundless strengthening of European identity. Still more important is the question of what role Europe wishes to play in the Security Council and, above all, in world economic institutions. Contrasting justifications of humanitarian intervention, not to speak of basic economic outlooks, divide the founder states of the EU from Great Britain and Scandinavia. But it is better to bring these smouldering conflicts out into the open than to let the EU splinter over dilemmas that remain unresolved. In any case, a Europe of two or three speeds is preferable to one that breaks up or crumbles away.

Jospin's hint at what the 'mechanism for strengthened cooperation' agreed at Nice might mean was unmistakeable: 'Naturally it could be applied to the coordination of economic policy in the Euro-zone, but also in fields like health and military procurements. With this kind of cooperation, a group of states that has always been indispensable could once again give new impetus to the construction of Europe.' A sober calculation of interests could well induce the French and German governments to seize the initiative again, once next year's elections to the Elysée and the Bundestag are over. The *International Herald Tribune* has dryly commented: "In the last resort, the rench will be prepared to pay a certain price for Berlin not becoming the

capital of Europe".[33] In line with the policies of Genscher and Fischer, Germans would be well advised to agree. Since diplomacy is at an impasse, open political controversy over the direction in which the EU should develop can only be of benefit. The constitutional–legal dispute between 'federalists' and 'sovereignists' masks a substantive dispute between those like Jospin, who regard harmonization of important national policies as urgent, and those like Schroeder, who would like a façade of tailormade central institutions deprived of all significant fiscal powers. All sides, however, can agree that delimitation of the competences of federal, national and regional levels is the core political issue to be settled by any European constitution.

[33] *International Herald Tribune*, 33, 12 June 2001.